United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

378

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DISTRICT OF COLUMBIA CIRCUIT

No. 24,203

ARLO TATUM, *et al.*,

Appellant,

—v.—

MELVIN LAIRD, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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Issues Presented for Review

Whether the collection, distribution and storage by the United States Army of detailed information about the identities, actions and beliefs of thousands of politically active, law-abiding individuals and organizations wholly unassociated with the Armed Forces, is a violation of the First Amendment and beyond the lawful authority of the Army.

This case was previously before this Court, under the same title and number, on Appellants' Motion for Summary Reversal or for Expedited Processing of the Appeal, and on Appellees' Motion for Summary Affirmance. Both motions were denied on June 12, 1970.

Reference to Ruling

The only ruling by the court below which sets forth the basis of the judgment presented for review by this court is an oral ruling from the bench. It is set out at pp. 11-12, *infra* and in the Appendix at pp. 134-135.

Statement of the Case

The complaint in this case was filed on February 17, 1970, by the plaintiffs on behalf of themselves and others similarly situated to challenge the constitutionality of the surveillance of lawful civilian political activity by the U. S. Army. At issue is the indiscriminate collection, distribution, and storage of detailed information about the identities, actions, and beliefs of thousands of politically active, law-abiding individuals and organizations wholly unassociated with the Armed Forces. The Army's domestic intelligence program also involves the conduct of undercover operations by military agents within the civilian community, the maintenance of over a dozen regional and national records centers on political protests, and the distribution to military units and to federal agencies of hundreds of "identification lists" describing individuals and organizations who have objected to governmental policies and social conditions. Plaintiffs' complaint alleged that these activities go far beyond any legitimate military need or authority, inhibit political participation and debate, and deprive plaintiffs and others similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed by the First, Fourth, Fifth, and Ninth Amendments to the Constitution of the United States.

Plaintiffs filed a motion for a temporary restraining order and for a preliminary injunction on March 12, 1970, seeking an order requiring the defendants to discontinue the surveillance complained of, to deliver to the Court (but not for public examination) copies of all files, reports,

blacklists, and other documents which the defendants claimed to have ordered destroyed, or which they planned to destroy, and to deliver to the Court copies of all receipts, certificates of destruction, and other accounts pertaining to the distribution, recall, and destruction of these records, and an inventory of all records like them, so that should the Court rule in the plaintiffs' favor, an effective final order could issue. The application for the restraining order was denied on March 13, 1970. Defendants filed a motion to dismiss on March 20, 1970. They have not yet filed an Answer.

On April 22, 1970 plaintiffs appeared before the Honorable George L. Hart, Jr., United States District Judge, prepared to proceed with an evidentiary hearing on their Motion for a Preliminary Injunction. Plaintiffs' witnesses were present in court and prepared to testify to the nature and scope of the surveillance and recording system maintained by defendants. In addition, subpoenas duces tecum had been served upon officers and agents of the defendants requiring their appearance at the evidentiary hearing, along with requested documents at issue in the request for preliminary relief. [By stipulation of the parties, witnesses in the employ of the defendants were allowed to remain on two-hour telephone notice pending their appearance to testify at the evidentiary hearing.] Plaintiffs, relying upon standard procedures which govern the issuance or denial of preliminary injunctive relief, and cognizant of the extraordinary nature of the order they were seeking against the Army and Defense Department, were thus prepared to go ahead with their witnesses in order that the District Court might have the benefit of the critical evidence to be presented by these witnesses, and not be

compelled to rely upon mere affidavits and documentary evidence. However, the District Judge denied plaintiffs' request to proceed with evidence and witnesses and ordered that the resolution of the Motion for Preliminary Injunction be decided solely upon oral argument and the papers previously filed with the Court (App. 132, 133). At several points during oral argument by counsel for plaintiffs, questions from the bench indicated the particular need and relevancy of witness testimony in order to determine the issue of preliminary relief (e.g., App. 134). However, upon oral argument alone, Judge Hart denied plaintiffs' motion for a preliminary injunction and granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted (App. 134-135).[1] Notice of appeal was filed on April 23, 1970. Plaintiffs' motion before this Court for summary reversal or for expedited processing of this appeal was denied on June 12, 1970.

Plaintiffs do not appeal the denial of a preliminary injunction. The only issue in this appeal is whether the

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[1] In dismissing the action, Judge Hart stated his conclusions of law as follows " . . . the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights" (App. 134-135). Thus, the Court's dismissal was for failure to state a claim upon which relief could be granted, consistent with the Court's determination that the type of activity engaged in by defendants-appellees was legitimately within the scope of Army authority. Judge Hart requested counsel for defendants to submit an order to that effect. However, when this order was presented and signed, without plaintiff's approval as to form, it stated that dismissal was also based upon "failure to state a justiciable controversy," a ground which was not alluded to by Judge Hart in his conclusions of law. For prudence's sake, however, we treat the issue in Point III, *infra*.

uncontested allegations of plaintiffs' complaint state a claim on which relief can be granted. All plaintiffs seek at this time is a remand to the District Court and an opportunity to prove the allegations of their complaint (as it will be ultimately amended to conform to the evidence uncovered by plaintiffs during their preparations for the April 22nd hearing).

Statement of Facts[2]

Plaintiffs are individuals and organizations unassociated with the armed forces whose constitutionally protected political activity has been the subject of direct and indirect surveillance by intelligence units of the U. S. Army. They sue on their own behalf and as representatives of their class. The nature of this surveillance, and the way in which it encompasses the political and social activities of thousands of individuals and organizations like the plaintiffs is set forth in (1) the Weekly Intelligence Summary (Exhibit A to plaintiffs' Complaint; App. 10-19); (2) the article "CONUS Intelligence: The Army Watches Civilian Politics," written by former Army captain Christopher H. Pyle (Exhibit B to plaintiffs' complaint; App. 20-53); and (3) numerous documents set forth as exhibits to the Affidavits of Messrs. Speiser and Temple in support of the plaintiffs' motions for a Temporary Restraining order and a Preliminary Injunction (App. 55-78).

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[2] All the facts related here were before the District Court upon its dismissal of plaintiffs' complaint. They must of course be taken as true in face of the defendants' motion to dismiss. *Clark* v. *Nebersee Finanz Korporation,* 332 U.S. 480 (1947).

The nature and scope of the program complained of has been confirmed by various Army spokesmen. In response to inquiries made by reporters for the *Chicago Sun-Times* and *The New York Times* during January 1970, public information officers at the Pentagon confirmed Mr. Pyle's charges that (1) the Army has 1,000 plainclothes intelligence agents stationed about the country, (2) the Army Intelligence Command has maintained a computerized data bank on political protests and the persons and organizations participating in them, (3) the same Command has published an "identification list," sometimes with photographs, of persons who have been active in civil disturbances, and that (4) Army intelligence agents have conducted undercover operations within the civilian community. (The *Chicago Sun-Times* inquiry was reported in the *New York Post* on January 27, 1970, and is set forth as Exhibit D to the plaintiffs' Complaint; (App. 54); *The New York Times* story was published the same day and is included as Exhibit B to Mr. Lawrence Speiser's Affidavit in support of plaintiffs' motions for a Temporary Restraining Order and a Preliminary Injunction).

Mr. Robert E. Jordan III, Army General Counsel and Assistant to the Secretary of the Army for Civil Functions, also confirmed allegations contained in the Pyle article. In identical letters dated February 25 and 26, 1970 and addressed to over thirty members of Congress and to Mr. Speiser, Mr. Jordan acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements." He admitted that the U.S. Army Intelligence Command maintained a computerized data bank on civilian political

activity at Fort Holabird, Maryland, and distributed an "identification list" describing persons and organizations "who might be involved in civil disturbances." Both the data bank and the identification list, he said, were not needed by the Army and he promised they would be destroyed. (A copy of this letter is set forth as Exhibit A to Mr. Speiser's affidavit; App. 61-65).

The Congressional inquiries to which Mr. Jordan replied were comprehensive in scope. (See, for example, the letters set forth as Exhibits E and F to the Speiser Affidavit; App. 73, 76). His reply was not. Plaintiffs believe it concealed from Congressional inquiry the existence of:

(1) a large microfilm data bank on civilian political activity indexed by computer and maintained by the Counterintelligence Analysis Division (CIAD) of the Office of the Army Assistant Chief of Staff for Intelligence;

(2) a second computerized domestic intelligence data bank maintained by the Continental Army Command at Fort Monroe, Virginia;

(3) extensive regional files maintained by the G-2s of the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington;

(4) extensive regional files maintained by the 108th, 109th, 111th, 112th, 113th, 115th, and 116th Military Intelligence Groups and the 710th Military Intelligence Detachment;

(5) cards and documents stored at the U.S. Army Intelligence Command's Headquarters from which the Com-

mand's computerized data bank was organized and made operable;

(6) a second blacklist, much larger than the first, popularly known as the "Compendium" and published by the Counterintelligence Analysis Division as a two-volume, yellow covered, looseleaf publication entitled *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* which describes numerous individuals and organizations unassociated with either the Armed Forces or with domestic disturbances.

(7) other publications, including monthly intelligence summaries published by each of the stateside Army commands, which describe individuals and organizations active in lawful political protests of no concern to the Army.

Thus, although Mr. Jordan promised that the Fort Holabird computerized data bank would be "discontinued," he did not indicate that duplicate and similar information located at numerous other record centers would continue to exist, thus making his assurances to Congress and to this court illusory. For descriptions and subsequent official acknowledgments of this undisclosed information see: "Army Drops Data Bank But Keeps Bank Data," *Computerworld,* March 11, 1970, p. 1 (Exhibit B, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction [hereafter Memorandum]); "Fort Sam Watches Civilians," *Express and News,* San Antonio, Texas, March 1, 1970, p. 1 (Exhibit H, Speiser Affidavit); "Army Hides Its Data Spy," *New York Post,* February 27, 1970, p. 25 (Exhibit C, Memorandum); "Spying on Civilians," *Time,* March 9, 1970, p. 17 (Exhibit D, Memorandum); "Data Dumping Called Gimmick," *The Bayonne Times,* Bayonne,

New Jersey, March 10, 1970, p. 1 (Exhibit 2, Temple Affidavit); "Army Continuing Its Political Intelligence Operation," *Chicago Sun-Times,* March 15, 1970, p. 3 (Exhibit E, Memorandum); Letter from Under Secretary of the Army Thaddeus R. Beal to Senator Sam J. Ervin, Jr., ca. March 20, 1970 (Exhibit F, Memorandum; App. 84-90); and Letter from Under Secretary Beal to Congressman Cornelius Gallagher, ca. March 20, 1970 (Exhibit G, Memorandum; App. 91-94).

Because of the inadequacy of Mr. Jordan's letter, Senator Sam J. Ervin, Jr., Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to defendant Resor on February 27, 1970 to request further information and to remind the Secretary that "The preservation of our civil liberties cannot depend on the lucky discovery of illegal programs." (Appendix D, Speiser Affidavit; App. 71-72). Congressman Gallagher simultaneously pressed Mr. Jordan for more information by threatening to hold hearings.

During this period, Members of Congress also expressed their judgment concerning the Army's need and authority to conduct such a broad domestic intelligence program. Senator J. William Fulbright, Chairman of the Senate Foreign Relations Committee, declared: "the Army has no business spying on the political activities of civilians—regardless of how distasteful or outrageous they may be to the military." *U.S. Congressional Record,* S3645, March 12, 1970. (Exhibit H, Memorandum) Senator Ervin stated: "The business of the Army . . . is to know about the conditions of highways, bridges, and facilities. It is not to predict trends and reactions by keeping track of the thoughts and actions of Americans exercising First

Amendment freedoms. . . . Regardless of the imagined military objective, the chief casualty of this overkill is the Constitution of the United States, which every military officer and every appointed official has taken an oath to defend." (Appendix C, Speiser Affidavit; App. 68-69).

To answer Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Cornelius Gallagher and to Senator Sam J. Ervin, Jr., on or about March 20, 1970 (Exhibits G and F, Memorandum; App. 84, 91). He admitted the existence of the second blacklist and promised that it would be recalled and destroyed. He acknowledged the maintenance of the microfilm and bank by the Counterintelligence Analysis Division, and stated that it would not be destroyed. With each letter he included a copy of a memorandum from Secretary of the Army Resor to the Army Chief of Staff announcing several new policies, including:

(1) "no (computerized) intelligence data bank operations relating to civil disturbance or other activities involving civilians not affiliated with the Department of Defense should be instituted without the approval of the Secretary of the Army and the Chief of Staff."

(2) "In view of the sensitivity of such operations, approvals will not be granted without consultations with the concerned committees of Congress."

(3) "If [any command down to the installation level] has . . . a [computerized] data bank, the data bank should be immediately destroyed, unless a report justifying its existence is submitted for approval as indicated above." (Exhibit I, Memorandum).

Under Secretary Beal's letters to Congress, his Affidavit in support of the defendants' Opposition to the Plaintiffs' Motion For a Preliminary Injunction and the defendants' Motion to Dismiss, and Secretary Resor's Memorandum to the Army Chief of Staff are less than candid. They fail to reveal, and ignore plaintiffs' allegations of, the existence of the Continental Army Command's nationwide data bank or any of the numerous regional data centers maintained by each stateside Army command and each Military Intelligence Group.

Upon completion of oral argument in the court below, Judge Hart, from the bench, granted the defendants' motion to dismiss the complaint, and denied the plaintiffs' motion for a preliminary injunction. Judge Hart failed to grasp both the serious invasions of political freedom involved in the Army surveillance program and its implications under the First Amendment. He asserted that he saw no difference between the collection of the information by the Army and its collection by the press, and, accepting every one of plaintiffs' allegations as true, could find no constitutional impropriety. He said (App. 134-135):

> "The Court: The Court holds that what in effect the plaintiffs are complaining of here is that the Army is keeping the type of information that is available to all news media in this country, covered by all news media in this country, and which is in the morgues of the newspapers in this country and magazines, and the Court holds that they state no cause of action; they show no unconstitutional action on the part of the Army; they show no threats to their rights. And I will sustain the motion to dismiss and I will deny the preliminary injunction, it following, of course, if it's ac-

ceptable to the motion to dismiss, that the great likelihood of plaintiffs maintaining this action is in the view of the Court zeroed. So I will deny the preliminary injunction and grant the motion to dismiss.

Present an order."

Judge Hart in fact was unable to resist the constitutionally irrelevant analogy between the Army's collection of information about the political beliefs and activities of private citizens and the collection, and even publication, of perhaps similar information by the nation's press. See Transcript, pp. 15, 16, 18, 21, 25, 26, 28, 42.

Argument

At stake in this lawsuit is the right of citizens to dissent from official government policy without fear of retaliation. Their freedom of expression, their right to privacy, and their presumption of innocence are all placed in jeopardy by governmental activity justified only by capricious claims of military necessity. It is patently clear that the government has embarked upon a program of monitoring constitutionally protected political activity to control dissent so that the government ultimately need meet no challenge to its actions. Those who dissent are ferreted out, placed under constant surveillance, and made the subject of dossiers to insure that, at any time the government chooses to do so, the voices of dissent can be easily identified and stilled, if not stilled in the interim by the mere prospect of such ultimate military retaliation.

The intelligence system maintained by defendants bears especially close scrutiny by the courts because it is in the

control of the military arm of government. The continued supremacy of the civilian authorities over the military is fundamental to American government. The Declaration of Independence contained the following complaint against King George III: "He has affected to render the military independent and superior to the civil power." As the Supreme Court recently said, in our system "living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government . . . have been exercised in conformity to the Constitution." *Powell* v. *McCormack,* 395 U.S. 486 (1969). The military authorities are not exempted from this statement. In fact, they must be uniquely susceptible to its impact if civil government is to survive. As the Supreme Court said, more than a hundred years ago, about a not dissimilar conflict between alleged military necessity and the constitutional rights of civilians: "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in the conflict, one or the other must perish" *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 124 (1866).

I.

The intelligence system maintained by defendants to monitor civilian activity violates rights guaranteed by the First Amendment.

Freedom of expression is no mere private right. It is a public interest "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965). The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964). Thus, any governmental action or program which interferes with that principle by inhibiting public discussion must be subjected to the closest scrutiny by courts of law charged with the duty of protecting our Constitution.

It is this overriding social importance of First Amendment rights coupled with their extreme fragility which has led the Supreme Court in recent years to expand the legal definition of what constitutes injury to those rights. The fundamental issue in this case is whether military surveillance of clearly protected political expression amounts to such a legally cognizable injury. Plaintiffs insist the question must be answered in the affirmative.

The constitutional objection to defendants' surveillance system is that it puts a burden on the exercise of First Amendment rights which has an "inhibiting effect in [sic] the flow of democratic expression and controversy [both] upon those directly affected and those touched more subtly." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 248 (1957). For

as Justice Brennan has stated it, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster-General,* 381 U.S. 301, 309 (1965) (concurring opinion). And, as the Supreme Court has made clear, recognition of such inhibition is not limited to cases in which overt sanctions are imposed. For example, the mere identification of people with views which are "unorthodox, unpopular or even hateful to the general public" causes the type injury cognizable under the First Amendment." "*Watkins* v. *United States,* 354 U.S. 178, 197 (1957). And as the Supreme Court declared in oft-quoted language from *NAACP* v. *Button*: "[T]he threat of sanctions may deter almost as potently as the actual application of sanctions." 371 U.S. 415, 433 (1963).

This is the essence of plaintiffs' First Amendment claims: when the military arm of government acts upon constitutionally protected political expression in a manner which can only burden that expression it constitutes an infringement of First Amendment rights. And it does not matter that the government claims its purpose in so "regulating" First Amendment rights is for the valid purpose of preventing and controlling unlawful civil disorders. Such an excuse for the invasion of First Amendment rights is impermissible "lest under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky,* 384 U.S. 195, 200 (1966). See generally, Askin, Police Dossiers and Emerging Principles of First Amendment Adjudication, 22 Stan. L. R. 196, 200-04 (1970).

The maintenance of the military intelligence network to monitor civilian activity by the armed forces at issue in

the instant action poses a grave threat to these precious First Amendment rights. Lest it become a "dragnet which may enmesh anyone," *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937), the federal courts must act to protect those rights by granting the appropriate declaratory and injunctive relief. *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota,* 389 U.S. 241 (1967); cf. *Stamler* v. *Willis,* 415 F.2d 1365 (7th Cir. 1969), cert. denied 38 Law Week 3522 (June 29, 1970).

Defendants claim their information-gathering activities relative to lawful civilian political protest is "authorized" by various directives and regulations governing the armed forces and the executive branch of the government. Then, in attempting to defend this surveillance system, defendants below appeared to rely upon a "balancing" test to demonstrate that the legitimate interest of the government in amassing certain data for the alleged purpose of quelling civil disorders justified the broader infringement of free expression caused by surveillance and reporting activity directed against civilians who pose no threat of disorder.

The initial fallacy in such an argument is that it would not justify a dismissal for failure to state a claim since there would be no way to balance the constitutional injury against the governmental need without a full-scale evidentiary hearing as to the nature and scope of the system, its usefulness and its impact on constitutional rights.

However, the more fundamental error is in the use of a "balancing" test at all. It is plaintiffs' position that where government acts directly upon constitutionally protected speech and/or association in a manner which adversely affects or inhibits the speaker or association, "balancing" is no longer a valid legal test of constitutionality.

In *United States* v. *Robel,* 389 U.S. 258, 268, n. 20 (1967), the Supreme Court recognized that courts may not "balance" away First Amendment rights to claim of governmental necessity:

> It has been suggested that this case should be decided by 'balancing' the governmental interests expressed in §5(a)(1)(D) against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination, we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between Congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. There is, of course, nothing novel in that analysis. Such a course of adjudication was enunciated by Chief Justice Marshall when he declared: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but con-*

> *sist with the letter and spirit of the constitution* are constitutional.' *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819) (emphasis added). In this case, the means chosen by Congress are contrary to the 'letter and spirit' of the First Amendment.

Thus, even the admittedly valid interest of the government in protecting defense plants from infiltration by saboteurs was not sufficient to justify the broad encroachment upon First Amendment expression and personal beliefs implicit in the restrictions imposed upon those who sought employment in defense plants.

See generally, Askin, Police Dossiers and Emerging Principles of First Amendment Adjudication, 22 Stan. L. R. 196 (1970).[3]

It has long been clear that First Amendment activity cannot be curtailed even to facilitate the regulation of conduct within the sphere of legitimate governmental concern. Thus, in determining that statutes may not interfere broadly with First Amendment expression, the Supreme Court has constantly insisted that "the breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *University Committee to End the War in Vietnam* v. *Gunn,* 289 F. Supp. 469 (W.D. Tex.) prob. jur. noted, 89 S. Ct. 119 (1968); *Brooks* v. *Auburn University,* 296 F. Supp. 188

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[3] This article, whose author is one of the attorneys in this case, supplements the legal theory underlying plaintiffs' First Amendment claims as set out in this brief.

(M.D. Ala. 1969). The critical determination to be made is not whether the state has a valid interest in regulating certain conduct, "but whether the means chosen to achieve a legitimate end are so sweeping that fundamental personal liberties are stifled." *Davis* v. *Francois,* 395 F.2d 730, 735 (5th Cir. 1968).

In *Dombrowski* v. *Pfister, supra,* a federal court was held to have a duty to exercise its broad equity power to protect political activists and dissenters from state action which attempted to regulate conduct protected by the First Amendment. Overbroad state regulations sweeping beyond First Amendment limitations must be struck down by a federal court even at the expense of important considerations of comity, the Court held. Justice Brennan stated the fundamental national policy reasons for this determination in *Dombrowski, supra,* at 486:

> When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett* v. *Bullitt, supra,* 377 U.S. at 379. For 'the threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .' *NAACP* v. *Button,* 371 U.S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. *For free expression—of transcendent value to all society, and not merely to those exercising their*

rights—might be the loser. Cf. Garrison v. *Louisiana,* 379 U.S. 64, 74-75. For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *NAACP* v. *Button, supra,* 371 U.S. 415, at 432-33; *cf. Aptheker* v. *Secretary of State,* 378 U.S. 500, 515-517; *United States* v. *Raines,* 362 U.S. 17, 21-22.

The constitutional vice in *Dombrowski, supra,* and its related cases stemmed from overbroad statutory regulation. But the requirements are no different for any form of governmental activity which infringes upon this special area of constitutional protection where legitimate political activity of citizens and organizations forms "the very essence of constitutional liberty and security." *Boyd* v. *United States,* 116 U.S. 616 (1886). The spectre of repressive governmental programs instituted in the name of a purported public interest in maintaining order or insuring governmental security can only bring to mind the similar justifications which allowed the Nazi SS troops and the Soviet NKVD to spread terror and fear among the people of those nations by making freedom of speech synonymous with a knock on the door in the dark hours of the night. Such intrusions into the personal and political lives of citizens of the United States have been emphatically rejected by the Supreme Court. See *Boyd* v. *United States, supra; Talley* v. *California,* 362 U.S. 60 (1960).

In *Talley,* the court struck down a city ordinance providing that any person distributing a handbill was re-

quired to identify himself or the source of the publication. Justice Black noted the importance of anonymity in assuring freedom of expression would continue, unhindered by fear of retaliation:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of the Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.
>
> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates* v. *Little Rock; NAACP* v. *Alabama. The reason for these holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.* 362 U.S. at 64-65 (emphasis supplied).

Thus, the value of anonymity is an essential part of the right to privacy and of the right to freedom of speech and expression protected by the First Amendment. See, Westin, *Privacy and Freedom* (1968). The deterrence effected by

the knowledge that the government may use your name, your speech, and whatever other data is encompassed within the surveillance and reporting aspects of defendants' intelligence network at any time, present or future, is a substantial one. It is clear that in challenging governmental action which infringes upon First Amendment rights, all possible applications of the activity may be considered. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Dombrowski* v. *Pfister, supra.*

In a recent New Jersey case, a lower court struck down a program proposed by the State Attorney General to monitor political protest activity and make reports about participants in demonstrations and other aspects of dissent. The New Jersey Superior Court recognized the issues at stake in rejecting the Attorney General's argument that the police power of the state should validate such a sweeping program of dossier building. Its opinion bears close scrutiny since the activity complained of there is strikingly similar, though on a much smaller scale, to the activity complained of here.

> . . . Where the First Amendment rights are involved, mere judicial recognition of the legitimacy of governmental goals in controlling unprotected and illegal conduct cannot be sufficient to support any given regulation, law or official act. Nor should it be the task of the judiciary to balance governmental need against First Amendment rights when the regulation, law or official act goes beyond areas reasonably necessary to reach the permissible governmental goal, and thereby inhibits the rights of persons who otherwise would not be affected by more narrow efforts on the part of the government to control unlawful conduct. [*Anderson* v. *Sills,* 106 N.J. Super. Ct. 545, 555 (Ch. Div. 1969).]

The Superior Court decision was reversed by the Supreme Court of New Jersey, *Anderson* v. *Sills,* 56 N.J. 210 (1970), but on grounds which do not affect the application of the principle of the lower court decision to the case at bar. Indeed, the decision of the New Jersey Supreme Court itself does no harm to the case at bar, for it explicitly recognizes limitations upon the power of government agencies to collect and maintain information regarding constitutionally protected political activity of private citizens.

Fundamental to an analysis of the decision in *Anderson* v. *Sills* is that the conduct being tested there involved local law enforcement agencies—agencies which have the full-time, properly authorized power to detect and prevent criminal activity. The directives being challenged in *Anderson* were at least arguably related to that responsibility.[4] Even so, the New Jersey Supreme Court did not grant *carte blanche* to the police. The Court acknowledged that some information being collected "could not reasonably . . . be relevant to the police function, detectional or preventative . . ." 56 N.J. at 230. Consequently, the case was remanded to the trial court to enable plaintiffs to show the extent and nature of the information being collected and maintained to determine whether it might be "wholly unrelated to the police obligation . . . ", 56 N.J. at 226.

Though we assert that the defendants in the case at bar have no authority whatever to engage in political surveillance of American citizens, and indeed that they are forbidden from doing so by the First Amendment, application even of the *Anderson* criteria requires a reversal of

[4] We say "arguably" because counsel in the case at bar are also counsel in *Anderson* v. *Sills* and do not intend to make any concessions here which might be used in *Anderson.*

the decision below for the simple reason that the "obligation" of the U. S. Army does not, by any stretch of the imagination, encompass surveillance of constitutionally protected political activity. That "obligation," if it exists at all, is the function of local law enforcement officers.[5]

The function of the Army, with respect to civil disorders, is only supplementary to local law enforcement officials. The Army's predominant and almost exclusive function is to defend the United States against foreign attack. Its role in civil disorders is carefully circumscribed by statute and is at best a marginal function. It comes into operation only when local law enforcement agencies are *in extremis* and unable by themselves to maintain order. More particularly, it comes into operation, under statute, only upon request of a state legislature or governor to suppress any insurrection or domestic violence against a state government. 10 U.S.C. Secs. 331-333.

Granting that authority, as of course we must, the factual question must be faced whether that authority invests the Army with a roving commission to keep tabs on the widest variety of Constitutionally protected political activity. The answer must be "No".

Recall that the New Jersey Supreme Court justified *some* intelligence gathering operation in the political arena on the ground that local law enforcement agencies have the "obligation" to detect and prevent crime. The opinion repeats that formula several times, focuses upon it, and its opinion rests upon it. And it says, "The preventative role of the police necessarily implies a duty to gather data

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[5] Nor did the court below permit the kind of evidentiary hearing which the Supreme Court of New Jersey considered essential to a determination of whether a particular surveillance system went beyond constitutional limits.

. . . " 56 N.J. at 227. And again, "The basic approach must be that the executive branch may gather whatever information it reasonably believes to be necessary to perform the police roles, detectional and preventative. A court should not interfere in the absence of proof of bad faith or arbitrariness." 56 N.J. at 229.

The Army has no detectional or preventative roles; at least it didn't have those roles before it undertook them itself as demonstrated by the subject matter of this case. That undertaking, however, is better described as usurpation of power and a clear transgression upon both the First Amendment and the fundamental Constitutional notion that, in the United States (if not in Greece or Peru, for example), the armed forces are subordinate to civilian power. Let the Army get its nose in the door of the tent, and who knows but that we too might go the way of other nations now ruled by the junta.

The government made much in its brief below (and will no doubt do so on appeal as well) of the need for the Army to be adequately prepared to perform its role efficiently in the event of civil disorders should its presence be requested by state officers. We will, for that purpose, permit the Army to survey the sites of potential trouble-spots to learn where they might land their helicopters, garage their trucks, quarter their troops, and water their horses. That should be the end of it, otherwise we run the risk of establishing the idea that the Army's power extends into the political beliefs and activities of Americans—but that is forbidden by the Constitution. The Army should be impressed with that fact now, in this case, before it goes any further.

Lamont v. *Postmaster General,* 381 U.S. 301 (1965), is explicit support for our position that the Army's political surveillance program violates the First Amendment. In *Lamont,* the Court struck down a scheme which required addressees of foreign communist propaganda to return a reply card if they wanted such material delivered by the Post Office Department. In doing so, the Court made it clear that it was not the minimal burden of returning the card that was at fault, but rather that such a requirement was "almost certain to have a deterrent effect, especially as respects those who have sensitive positions." 381 U.S. at 307. Similarly, the lower court in *Lamont's* companion case had recognized that reluctance to be identified with unorthodox political views "cannot help but deter the free expression of ideas." *Heilberg* v. *Fixa,* 236 F. Supp. 405, 509 (N.D. Calif. 1964). To similar effect was the statutory scheme of regulation of associational activities invalidated in *NAACP* v. *Button, supra,* because of the deterrent effect it would have upon the exercise of delicate First Amendment rights, including the right to privacy of association.

Governmental surveillance and maintenance of dossiers on persons who engage in protest against government policies and programs constitutes a burden which may deter the more cautious and discreet from engaging in protest activity, or from expressing their opinions in the First Amendment context. It was for this reason that an injunction was granted in *Local 309* v. *Gates,* 75 F. Supp. 620 (N.D. Ill. 1948), against state law enforcement officers forbidding their attendance at Union meetings during a strike. The federal court recognized that the presence of the officers had an intimidating effect upon the members of the Union in attendance at the meetings and held that freedom of speech and assembly were inhibited despite state conten-

tions that the presence of the officials was designed to prevent a recurrence of previous violence.

The dangers of allowing a system of surveillance and reporting of civilian activity by the military, such as that presented by defendants' intelligence network, are grave indeed. They not only inhibit the freedom of expression protected by the First Amendment, they also infringe upon the privacy of the citizen to pursue his life and beliefs free of governmental interference or direction. As the President's Commission on Law Enforcement and the Administration of Justice correctly recognized:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. [*Task Force Report: Organized Crime,* 18 (1967)]

The recent decisions of the Supreme Court in the First Amendment area indicate that it is not the form which governmental action takes as much as it is the impact which such action has upon the right of every citizen to express himself freely. Thus, whether the government makes it a crime to express thoughts, *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), puts a tax upon expression, *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), cf. *Speiser* v. *Randall,* 357 U.S. 513 (1957), makes the speaker ineligible for certain employment, *United States* v. *Robel, supra,* or puts the speaker's name on a list of suspect persons for future reference, *Lamont* v. *Postmaster General, supra,* the funda-

mental vice is that both the individual immediately affected and all others who may want to express the same or similar ideas may be inhibited from exercising their constitutional rights.

The trial court in *Anderson* v. *Sills, supra,* summed up the legal doctrine as follows:

> The constitutional doctrine which is found as a common thread in the cases just cited, rests on the premise that First Amendment rights are of transcendental value to all society and not merely to those exercising their rights. *Dombrowksi* v. *Pfister, supra.* Thus, the injury to be remedied is considered not only personal, but, also, one affecting society as well. Such injury must be measured by the impact the given inhibitory regulation, law, or official act may have on those who will not complain because of the chilling effect that even that action might have on their otherwise absolute right to do so. Of course, whether a given regulation, law or official act will have a chilling effect on the First Amendment rights of an individual probably cannot be proved in any objective measurable manner in any given case. Accordingly, I believe that the constitutional doctrine requires that we consider any burden placed upon First Amendment rights which might reasonably be expected to interfere or to prevent their exercise as constituting an impermissible infringement on those rights. [106 N.J. Super. at 554.]

Despite the New Jersey Supreme Court's rejection of that view and its remand for, *inter alia,* proof of the "chilling effect," plaintiffs respectfully submit that the lower

court's analysis of the U. S. Supreme Court's recent rulings was a sound one.[6]

The First Amendment is intended to allow the people of the United States freedom to criticize and change government policy where they see it deviating from its heritage or commitments. If the government can command silent obedience simply because of fear of speaking out, the people have lost their ultimate control over arbitrary governmental power.

II.

Defendants' civilian intelligence system exceeds the lawful needs and authority of the U. S. Army and is without any lawful statutory authority.

Defendants below relied upon a variety of statutory authority and departmental directives to support their contention that the Army intelligence activities at issue in this case are lawful. To be sure, the executive has both constitutional and statutory authority to provide for the defense of the nation in times of crisis. However, this does not mean that the government is allowed to wander within the First Amendment area of civilian dissent casting its net for lawful and unlawful activities alike under the guise of preparing to quell domestic rebellion if it should occur. Directives issued by the Secretary of Defense or other departmental heads carry no authority above the Constitution. They are subject to the rules of

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[6] And note the New Jersey Supreme Court did not suggest that plaintiffs' case should be dismissed for failure to state a claim, but rather that plaintiffs should have an opportunity to prove their claim.

judicial review laid down in *Marbury* v. *Madison,* 1 Cranch 137 (1803), just as are any other justification for governmental activity, statutory or otherwise. The need for "relevant background information" (Government's brief below, p. 4) does not require that the government maintain computer files on the activities of civilians which encompass dissent against government policies or military objectives. Defendants admit (Government's brief below, p. 5) that "the information gathering activity of the Army relating to potential civil disturbances is but one small part of the preparation to commit Federal forces." This fact does not justify the unconstitutional invasions of expression and privacy of the citizenry, no matter how legitimate the purported purpose may be. Defendants below cited *Alabama* v. *United States,* 373 U.S. 545 (1963), as support for the proposition that such informational activities are constitutionally permissible, but the Supreme Court determination in that case rested upon entirely different grounds than the grave conflict at issue in the instant action. Federal troops were placed in Alabama pursuant to the directive of President Kennedy when it appeared that state officials were unwilling to protect the rights of black citizens of this nation seeking to enforce the guarantees of the Constitution promised to them a century before. In rejecting the contention of Alabama officials that federal troops ought not to be stationed in the Birmingham area in a time of deepening racial tensions, the Court was sustaining the mandate of the Constitution, particularly the Civil War Amendments, against efforts by a state to thwart the legitimate activities of determined citizens seeking justice and freedom. There is no parallel between the *per curiam* decision of the court in that case and the case at bar. No governmental dossiers

were amassed to determine who was dissenting or protesting. They were unnecessary. Anyone who read the newspapers or watched television knew of the resistance of Southern administrators to the efforts of black and white Americans to make equality a reality. The government cannot be permitted to justify unconstitutional activity by relying upon a totally different case, arising out of totally different and unrelated facts. The contention of the Alabama officials was spurious, designed to prevent the mandate of the Constitution from being applied to their state. Governmental activity which infringes upon the protected area of freedom of expression bears no relation to the readying of troops to check a dangerous temper in a community upon which the eyes of the world are focused. To be sure, equally fundamental rights were at stake. And consistent with our framework of government, the Supreme Court refused to allow considerations of "general adversity" to deter it from performing its highest duty of preserving our basic freedoms unhindered.

Similarly, executive regulations are always subject to constitutional limitations. The government contends that the fact that such regulations exist relating to the hiring of civilians or their fitness for continued employment are justified in the name of national security, means there can be no challenge to the intelligence system at issue in this case. That is clearly baseless. The Supreme Court has held that threatened dismissal from or actual denial of employment may inhibit First Amendment rights when based upon loose standards of "loyalty" or "security." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606 (1967); *United States* v. *Robel, supra.* Governmental regulations established in quest of national security which re-

quired employees to divulge First Amendment activities and associations have not been sanctioned by the Courts:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which interferes with freedom of assembly, it said in *American Communications Association* v. *Douds, supra* (339 U.S. at 402):
>
> > A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature. Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. [*NAACP* v. *Alabama,* 357 U.S. 449, 462 (1958).]

Thus even the legitimate interest of government in protecting national security is subject to judicial review and constitutional guidelines.

In *Schneider* v. *Smith,* 390 U.S. 17 (1968), the Supreme Court rejected the contention advanced by the government that the Magnuson Act [50 U.S.C., Sec. 191 (b)] author-

izing the President to "safeguard vessels against destruction, loss or injury from sabotage or other subversive acts," allowed him to require a questionnaire be filled out by merchant seamen questioning their ideological beliefs and associational activities. The Court reversed a dismissal of the complaint by a three-judge court, noting that jurisdiction was beyond question since plaintiffs had challenged the statute as an overbroad infringement of First Amendment rights and questioned "whether the power to set up such a screening program was validly delegated." The Court found that the Act itself gave the President no express authority to establish such a program "to ferret out ideological strays in the maritime industry." And it said "the purpose of the Constitution and Bill of Rights . . . was to take the government off the backs of the people. The First Amendment's ban against Congress abridging freedom of speech, the right peaceably to assemble and to petition, and the associational freedom (*Shelton* v. *Tucker, supra,* at 490) that goes with those rights, create a preserve where the views of the individual are made inviolate." 390 U.S. at 25-26. The Court also found that "the present case involves investigation, not by Congress but by the Executive Branch, stemming from Congressional delegation."

The instant case presents a situation where the armed forces have established an intelligence network to spy upon civilian political activity, backed up with computerized data banks and unlimited storage and filing capacity, with what is, at best, dubious Congressional authorization. In fact, the very Congressmen who have challenged the authority of the Army to engage in the type of surveillance/reporting system involved here have indicated that they are deeply concerned that the Army

has acted beyond the scope of Congressional authorization and entered a forbidden area of protected rights.

In *Cole* v. *Young,* 351 U.S. 536 (1955), the Court rejected the government's contention that the loyalty security program established pursuant to Executive Order 10450 had the objective of "insuring the 'unswerving loyalty' of all employees, regardless of position, as a matter of 'national security' to be effectuated by the summary procedures authorized by the Act [of Congress relating to national security]." 351 U.S. at 545. "We find no justification," said the Court, "for inferring the unlimited power contended for by the Government." Thus, they limited the scope of the directive and enactment to only "sensitive" positions, rather than to all positions with the government and determined that the dismissal of an employee of the Department of Health, Education and Welfare had been unjustified, particularly "in view of the stigma attached to persons dismissed on loyalty grounds [where] the need for procedural safeguards seems even greater than in other cases." 351 U.S. at 546.

For defendants to suggest that the authority to infiltrate legitimate organizations, report upon lawful civilian protest activity, and record such information in computer files stems from departmental directives and statutory authority to quell disorders, flies in the face of the Constitution. "Even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398 (1934). Even concern over civil disorders cannot supersede the First Amendment guarantees. The language of the Court in *United States* v. *Robel, supra,* bears repeating here:

> . . . . [N]ational defense cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideas have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the nation worthwhile. [389 U.S. at 264]

More than a hundred years ago, in the historic case of *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 120, 121 (1866), the Supreme Court declared:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Thus, the attempt to say that because the government has certain broad powers which may be exercised to quell armed rebellion within the boundaries of the nation justifies interference with the legitimate political activity of the civilian population must fail. It neither grasps the importance of the rights at stake nor sees the dangers

to be apprehended by allowing even a valid limited governmental interest in defense to regulate the wider, more valuable area of protected freedom of expression enshrined within the First Amendment. Defendants have no business meddling in this domain.

III.

Plaintiffs' claim is justiciable.

In determining whether a claim is justiciable, the Court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker* v. *Carr,* 369 U.S. 186, 198 (1962). These standards were reasserted by the Supreme Court in *Powell* v. *McCormack,* 395 U.S. 486 (1969). It is thus beyond dispute that allegations of serious and substantial constitutional violations by governmental activity present a conflict susceptible of judicial resolution. *Stamler* v. *Willis, supra.*

Both the claim presented and the remedy sought in the instant action are easily identified. A substantial conflict has been raised between fundamental rights guaranteed by the Constitution and actions of the government taken in pursuit of "legitimate" objectives which interfere with those rights. The fact that a coordinate branch of government is involved, however, has never prevented the Court from fulfilling its constitutional mandate to resolve significant conflicts which affect the interpretation of the laws and the constitutional guarantees by the United States as they may affect the citizenry. The ability of federal courts to fashion a remedy in cases involving the military has

been clear since *Ex Parte Milligan, supra.* And, in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), the Court had to exercise its "painful duty" of determining that the President had exceeded his lawful authority by nationalizing the nation's steel mills. As Mr. Justice Frankfurter pointed out, "the judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government." 343 U.S. at 597. Similarly, in *Powell* v. *McCormack, supra,* the Court determined that Congress had exceeded its constitutional authority by excluding Representative Powell from taking his seat in the 90th Congress. "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." 395 U.S. at 549. In fact, where governmental actions are alleged to intrude upon protected constitutional rights, justiciability should be more readily assumed than in any other type of action. In the words of former Chief Justice Earl Warren: "If judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrain from examining the merit of the claim of necessity must be kept to an absolute minimum." Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L.Rev. 181, 193 (1962).

Where constitutional violations are asserted against government, a plaintiff need not wait until he has been successfully prosecuted, denied a license, dismissed from employ-

ment, or otherwise directly subjected to the force of a law or policy before he may institute a challenge in court against it. *Evers* v. *Dwyer,* 358 U.S. 202 (1958); *Railway Mail Association* v. *Corsi,* 326 U.S. 88 (1945); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Reed Enterprises* v. *Corcoran,* 122 App. D.C. 387, 354 F.2d 519, 523-24 (D.C. Cir. 1965).

Plaintiffs have alleged infringement of their rights protected by the First Amendment to the Constitution to engage in discussion, debate and dissent concerning politics and policies of the government. The concerted program of surveillance and reporting activity contained within the framework of the armed forces intelligence network intrudes impermissibly into the area of the First Amendment. Such intrusion presents a substantial conflict, for First Amendment rights are particularly vulnerable and easily inhibited. Where governmental action "dampens the vigor and limits the variety of public debate," it is inconsistent with the First Amendment. *New York Times* v. *Sullivan,* 376 U.S. 255 (1964). It is therefore subject to redress via declaratory or injunctive relief in order to prevent vague and overbroad governmental action from hindering precious freedoms of the First Amendment. *NAACP* v. *Button,* 371 U.S. 415, 433 (1963). Determination by the federal court that the rights asserted by plaintiffs are entitled to protection against unconstitutional encroachment by defendants' intelligence program will protect plaintiffs' fundamental freedoms as well as the interest of society at large in preserving the First Amendment inviolate from governmental attack.

Where a policy or program of government creates a chilling effect upon First Amendment rights, *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), justiciability is subject to

far less challenge than in comparable suits not affected with First Amendment interests. *National Student Association* v. *Hershey,* 412 F.2d 1103 (D.C. Cir. 1969). As the Second Circuit Court of Appeals noted in *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817, 828 (2d Cir. 1967):

> It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly. . . . *Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties.* (Emphasis supplied.)

Similarly, in *Reed Enterprises* v. *Corcoran, supra,* the court held that "where the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy." 354 F.2d at 523.

The important rights of expression protected by the First Amendment would never be vindicated if the judicial branch were to avoid the merits of this critical conflict between governmental actions and freedom of speech. Even if some form of after-the-fact action for damages might lie for loss of employment, injury to reputation, or other loss caused by being the subject of reports and dossiers in a civilian intelligence network maintained by the armed forces, First Amendment rights would still suffer the irreparable injury which *Dombrowski* v. *Pfister, supra,* warned against which stems simply from the existence of oppressive governmental action:

> We have . . . avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. [380 U.S. at 487.]

In the case at bar there is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski, supra.* There is a threat of unknown surveillance, unknown purpose, and unknown future use of the information gathered and recorded in connection with the defendants' civilian intelligence network. This creates a substantial chilling effect upon the free and uninhibited exercise of First Amendment rights. Delay in the courts simply compounds the injury.

Whether or not plaintiffs are themselves inhibited by the intelligence gathering system maintained by defendants, there are thousands of others less hardy who are not willing to pay the price of military recordation in order to take part in public affairs. If those least inhibited (or most moved to seek judicial redress by the sting of impermissible governmental action) are turned away from the courts because they do not stand to lose "enough" liberty, the more inhibited have no hope for redress. It was precisely for this reason that the Court in *Heilberg* v. *Fixa,* 236 F. Supp. 405 (N.D. Cal. 1964), aff'd *sub nom. Lamont* v. *Postmaster-General,* 381 U.S. 301 (1965), conceded that plaintiffs in a class action asserting loss of precious liberties must be treated as private attorneys-general acting on behalf of that class. Thus plaintiffs may assert the

rights of others "where fundamental constitutional rights of third parties may be denied and it would be difficult for persons whose rights are asserted to maintain suit in their own rights." 236 F. Supp. at 407. Additionally, plaintiffs assert the immediate injury to their own right of association caused when others more timid turn away from them. *NAACP* v. *Alabama,* 357 U.S. 449 (1958). As the New Jersey Supreme Court said in *Anderson* v. *Sills,* "there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters" (Opinion, p. 10).

It is for these very reasons that First Amendment rights have been held to be of such magnitude and entitled to such protection that even time honored principles of comity in federal-state relations and the separation of powers doctrine have been held inapplicable where it is alleged that governmental action unduly hinders the exercise of First Amendment rights. *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Sheridan* v. *Garrison,* 415 F.2d 699 (5th Cir. 1969); *Stamler* v. *Willis, supra; Wolff* v. *Selective Service Local Board No. 16, supra.* The peculiar nature of suits alleging a First Amendment chilling effect is that if the allegation is correct, immediate, real and irreparable injury is done to "transcendent" societal interests if even a few citizens are deterred from speaking their minds. This injury may result from threat of enforcement itself, even if the threat never materializes. *NAACP* v. *Button,* 371 U.S. at 433; *Dombrowski* v. *Pfister, supra.* Thus, the threat itself constitutes the "actual interference" with plaintiff's rights which the Court held to be an essential prerequisite for justiciability in *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947).

According to all the rules of justiciability, plaintiffs have presented a live and serious conflict which is uniquely appropriate for judicial resolution. As the Supreme Court held in *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), "where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief." See also *Sullivan* v. *Little Hunting Park Inc.,* 90 S.Ct. 400, 405 (1969). The remedies of the court are clear in the instant case. The fact that the system challenged is maintained by the military arm of the executive branch does not make the case any less appropriate for the federal courts to resolve the conflicts and protect the federal rights. In fact, the role of the court as the protector of these rights will be seriously minimized if it declines to hear this action on grounds of "justiciability." The federal courts have been vigilant in the protection of the rights of civilians from military encroachment. *Reid* v. *Covert,* 354 U.S. 1 (1957).

As the Supreme Court noted in *Reynolds* v. *Sims,* 377 U.S. 533, 566 (1964), the duty of the courts is to provide a forum whereby important rights may be vindicated: "A denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." This courtroom provides the only forum for challenging the unconstitutional exercise of governmental power presented in this action and providing the immediate relief required by the nature of the injury. The Army admits that its intelligence files contain a myriad of data, only some of which may have been destroyed or discontinued as unjustified by their authority. They also admit that they intend to continue to maintain such files and carry

on such monitoring and surveillance activities in the future. (See affidavit of Undersecretary of the Army Beal, App. 79-82.) The controversy is thus a continuing one and the threats to plaintiffs' First Amendment rights remain substantial. Waiting will not place plaintiffs in a more advantageous position. It will neither sharpen issues nor further clarify rights. It will simply heighten the effect and extent of the irreparable injury suffered and the damage to the First Amendment.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded for a hearing on the merits.

Respectfully submitted,

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,203

ABLO TATUM, ET AL., APPELLANT

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
APPELLEES

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF ISSUES PRESENTED [1]

1. Whether the Army's intelligence activity as it pertains to civilian disorders and other related activities is lawful?
2. Whether the District Court below had jurisdiction in this case?

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[1] This case was previously before this Court on Appellants' Motion for Summary Reversal or for Expedited Processing of the Appeal, and Appellees' Motion for Summary Affirmance. Both motions were denied on June 12, 1970.

3. Whether the District Court below was correct in dismissing the complaint for failure to present a justiciable controversy?

4. Whether the District Court below was correct in finding that plaintiffs failed to state a claim upon which relief could be granted?

5. Does the chilling effect doctrine apply in this case?

COUNTERSTATEMENT OF THE CASE

On February 17, 1970, plaintiffs instituted this suit in an effort to halt the defendants, especially the Department of the Army, from gathering by lawful means, or from maintaining or using in their intelligence activities, any information relating to potential or actual civil disturbances, street demonstrations or other allegedly "lawful and peaceful civilian political activity."

The relief sought by plaintiffs included a declaratory judgment that the Army's conduct was unconstitutional, preliminary and permanent injunctions halting all such activity by the Army in the future, and a mandatory injunction ordering the Army to turn over to the court for destruction all such data which it then had on hand. On March 12, 1970, plaintiffs filed a motion for a temporary restraining order in an effort to halt all current intelligence activities by the Army of the type set forth in their complaint. The application for a restraining order was denied on March 13, 1970; defendants then filed a motion to dismiss on March 20, 1970.

On April 22, 1970, counsel for both parties appeared before the Honorable George L. Hart, Jr., United States District Judge, for a hearing on plaintiffs' remaining motions for injunctive relief and defendants' motion to dismiss. In view of Judge Hart's request to plaintiffs' counsel prior to the hearing to present witness testimony in affidavit form where possible (Tr. 6)[2] and the number of

[2] Tr. refers to the transcript of the hearing; Br. refers to plaintiffs' brief and J.A. refers to the Joint Appendix.

affidavits that were already in the record, the hearing was restricted to oral argument alone.

After hearing and considering the arguments and pleadings and the affidavits, Judge Hart denied plaintiffs' motion for a preliminary injunction and granted defendants' motion to dismiss. On May 4, 1970, a Notice of Appeal of the latter decision only was filed by plaintiffs.

THE RELEVANT FACTS ARE AS FOLLOWS:[3]

Although the Army's intelligence activities include personnel security, special loyalty, and espionage investigations, plaintiffs' original complaint and present appeal

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[3] Contrary to plaintiffs' assertion in footnote 2 of their brief, the statement of facts set forth therein is not required to be taken as true for the reason they cited. In *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480 (1947) on which plaintiffs rely, respondent had alleged that it was "free from enemy taint" in its complaint, which it had filed to reclaim property taken by the Alien Property Custodian. In taking that allegation as true for the purposes of its decision, the Court pointed out that it was doing so "*since* the petitioner's motion to dismiss is based *solely* on the fact that respondent is a national of a foreign country." (Emphasis supplied). 332 U.S. at 482. Clearly, then, the Court's acceptance of the allegations contained in the complaint as being true was predicated on petitioner's failure to contradict them in its motion to dismiss.

In the case at bar, defendants filed an opposition to plaintiffs' motion for a preliminary injunction and, in so doing, set forth defendants' opinion as to a proper statement of the facts. That statement was presented to the Court in the form of an affidavit of Thaddeus R. Beal, the Under Secretary of the Army, and it clearly contradicted plaintiffs' version of the facts. Since defendants' statement of the facts was expressly incorporated by reference in our motion to dismiss, *Clark, supra,* does not apply. On the other hand, plaintiffs are correct to the extent that when the lower court considered defendants' motion to dismiss, it was required to assume that all the *well-pleaded* facts presented by plaintiffs were true. *Grand Opera Co.* v. *Twentieth Century Fox Film Corp.*, 235 F. 2d 303 (7th Cir., 1956). But it was not to consider plaintiffs' unsupported conclusions as true. *Lewis* v. *Brautigam*, 227 F. 2d 124 (6th Cir., 1955). Nor was it to consider as true any unwarranted inferences from the facts. *Ryan* v. *Scoggin*, 245 F. 2d 54 (10th Cir., 1957). Therefore, for purposes of reviewing Judge Hart's decision as to the motion to dismiss, only plaintiffs' well-pleaded facts are to be taken as true. With respect to any other issues set forth in the appeal, the court need not assume those facts are true.

are primarily based on the Army's collecting information regarding civilian activity, as that activity pertains to threats to the security or the mission of the Army or when it deploys federal troops to assist local civilian authorities in restoring order. Accordingly, the following counterstatement of facts is limited to the authority for that activity by the Army to which plaintiffs object and not the other types of investigations conducted by the Army listed previously.

Title 10, United States Code, sections 331-333, provide that upon request of any state legislature or governor, the President may use such of the armed forces as he deems necessary to suppress any insurrection or domestic violence against a state government.[4] Consistent with his position as the principal assistant to the President on matters of defense, the Secretary of Defense issued a directive[5] establishing uniform policies in the use of military and civilian personnel, facilities, equipment or supplies during civil disturbances. By that directive, the Secretary of the Army was designated as the "Executive Agent for the Department of Defense in all matters pertaining to the planning for, and the deployment and employment of military resources in the event of, civil disturbances." One of the enumerated responsibilities of the Secretary of the Army is "(7) Providing essential planning, operational and intelligence data to the National Military Command Center and the military service command centers on a timely basis to insure that the National Command Authorities and appropriate military service command authorities are adequately informed."

Title 10, United States Code, Section 3012 provides another basis for such activity on the part of the Army. There, the Secretary of the Army is charged with and has

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[4] Presidential authority has been exercised no less than three times in the last two years: Executive Orders 11403, April 5, 1968; 11404, April 7, 1968; and 11405, April 7, 1968, 3 CFR 1968 Comp. pp. 107-110.

[5] DOD Dir. 3025.12, June 8, 1968, 32 CFR 187.1 *et seq.*-329.

the authority to conduct all affairs of the Army. Those affairs include the ". . . maintenance, welfare, preparedness, and the effectiveness of the Army. . . ."

As set forth in his affidavit, Thaddeus R. Beal stated (J.A. 79):

> Pursuant to the authority set forth in Title 10, United States Code, sections 331, 332, 333 and 3012, Executive Order 10450, 27 April 1953, 3 CFR, 1949-1953, Comp., p. 936, and Department of Defense Directives 5210.7, 5210.8, 5210.9 and 3025.12 (June 8, 1962, 32 CFR 187.1 *et seq.* to 329) *the intelligence activities of the Department of the Army within the United States relate pertinently to* (1) personnel security investigations, in order to determine whether civilian and military employees of the Army and employees of Defense contractors can be granted access to classified information, (2) special investigations pertaining to loyalty and espionage matters, concerning civilian and military employees of the Army, and (3) *the gathering of information concerning activities which may* adversely affect the mission or security of the Army, or *require the Army to deploy its troops to assist civilian authorities in restoring stability when so ordered by the President.*
>
> Completed investigative records are kept in a central file located at the U.S. Army Investigative Records Repository. Army Regulations require that the files in the Records Repository be carefully controlled and access to the files be limited to those with a strict "need-to-know." It is the firm policy of the Department of the Army that any adjudications based on these files will be made only after an entire investigative file has been reviewed. Accordingly, the files in the Records Repository are not summarized and are not computerized in any way.
>
> In order to further assist in these investigations, the Department of the Army maintains, for the Department of Defense, the Defense Central Index of Investigations. This Index, which will be computerized shortly, is designed to locate all security and criminal investigative files maintained by the military departments. This Index also does not contain

any information indicating the nature or the conclusions of the investigations in question. The sole purpose of this Index is to locate files in order to reduce the time for investigations.

The Department of the Army has primary responsibility among the military services for planning for and rendering assistance to civil authorities in civil disturbances. 32 CFR Section 501.1(b). With respect to the employment of military resources in the event of civil disturbances the Department of the Army has been charged by the Department of Defense to, among other things, provide *essential intelligence data* to ensure that appropriate military authorities are prepared to render assistance to local civilian authorities when ordered to do so by the President under constitutional and statutory authority. The Army is also charged with keeping the Secretary of Defense informed of unusual military resource requirements (actual or potential) and other *significant developments* in connection with civil disturbance plans and operations. 32 CFR Section 187.6 (a)(8). (Emphasis supplied.)

The Attorney General has been designated by the President as the Chief Civilian Officer in charge of coordinating all Federal Government activities relating to civilian disturbances. (J.A. 108) He coordinates his activities with the Secretary of Defense, who, in turn, is directly responsible for gathering information for the military. The Secretary of the Army has been designated as the Executive Agent responsible for civil disturbance matters with which the Army may be concerned, subject to the supervision of the Secretary of Defense.

Plaintiffs' objection to this activity as being unlawful, unnecessary, and an unconstitutional infringement on their rights constitutes the basis of their suit.

SUMMARY OF ARGUMENT

Article III, Section 2 of the Constitution sets forth a limitation on judicial power; a court's power is restricted to the resolution of cases or controversies. Plaintiffs

sought a declaratory judgment; that procedure is available in federal courts only in cases involving an actual case or controversy, as well. *Coffman* v. *Breeze Corporations*, 323 U.S. 316, 324 (1945) and cases cited therein. If plaintiffs are now to prevail in this appeal of the District Court's decision granting defendants' Motion to Dismiss,[6] they must demonstrate that the Army's conduct is unlawful or unconstitutional, that the court had jurisdiction, and that they presented to the court below both a justiciable controversy and a claim upon which the court could grant relief. Since plaintiffs allege that the Army's activity has a chilling effect on the exercise of their constitutional rights, they must also show that the chilling effect doctrine applies in their case. None of these factors are present and, therefore, their complaint was properly dismissed.

I. The Army's Intelligence Activities as They Pertain to Civilian Disorders and Other Related Activities are Lawful, Proper, and Within the Confines of the Powers and Duties of the Executive Branch.

Although the Army's role traditionally has been the defense of the country from outside forces, recently it has been called upon to exercise another of its responsibilities with greater frequency; it has, in certain circumstances,

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[6] Plaintiffs point (Br. p. 4, fn. 1) to a variance between Judge Hart's language at the hearing when he dismissed their complaint ("they state no cause of action") and the language of his final order which allegedly included a new basis not discussed at the hearing ("failure to state a justiciable issue").

First, the distinction, if true, has no legal significance in this case. Where the result reached by a lower court is found to be correct, it must be affirmed by the appellate court even though the lower tribunal may have given the wrong reason or reasons for its decision. See *Lum Wan* v. *Esperdy*, 321 F. 2d 123 (2nd Cir., 1963); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Riley* v. *Commissioner of Internal Revenue*, 311 U.S. 55 (1940). Furthermore, plaintiffs were sent a copy of the proposed order two days before defendants were required to submit one. They made no attempt to vacate Judge Hart's order, if they believed it in error, nor do they contest the variance in Part III of their argument where they discuss justiciability.

been called upon to act in the role of a policeman. In the past several years, there has been a succession of violent protests, including, but not limited to, ransacking Selective Service offices, plundering defense-oriented businesses, holding up troop and supply trains by lying on the tracks, unlawful attempts to enter upon military bases for demonstration purposes, and riots in areas of our large cities. For example, our Nation, during the Summer of 1967, witnessed the tragic riots in Detroit and Newark and, for the first time in 25 years, the Army was called in to assist the local civilian authorities in quelling the Detroit disturbances. During the period 1967-68, the National Guard was called upon 83 times and the Army four times to quell cases of civil disorder. The March on the Pentagon, the disturbances at the Democratic Convention, and the rioting in the Nation's Capital, which left large areas of the City leveled, all required the use of the armed forces to bring order out of the chaos. It has been reported that during the month of April 1968 alone, there were 237 civil disorders, 27,000 arrests, 43 deaths, over 58 million dollars in property damages, and over 58,000 National Guard and Army troops had to be used 25 times to quell the civil disturbances. *U.S. News and World Report*, September 2, 1968. See also the Brandeis University Lemberg Center for Study of Violence Reports; *Disorders—1968*, by the General Adjustment Bureau, Inc.; *Riot and/or Civil Commotion Report* by the American Insurance Association.

With the ever-increasing frequency of civil disturbances, disorders, riots and confrontations, local law enforcement officers have begun to find themselves incapable of coping with civil disorders and demonstrations and, for that reason, the President has, when requested, had to employ the use of the military to restore order in the troubled areas.

When the National Guard or the U.S. Army moves in to restore order, their function is unquestionably in the role of a policeman; they simply accomplish what the police lack the number of men to do. They patrol streets, make arrests, regulate traffic, and try to calm down

angry crowds, just as local policemen would do. In performing those duties, they necessarily require some of the same tools as a police force, both to quell the disturbances and to perform an *equally important* function, the prevention of further disturbances.[7]

In order to carry out these duties as efficiently as possible, both the Army and the police must have an awareness of group tensions, what forces exist, the nature and size of discordant groups, and they must be capable of estimating the explosive possibilities of colliding philosophies. More importantly, they must know which private citizens possess a rapport with the various groups involved in the disorders in order that they may call upon those citizens to help extinguish the fires of passion raging in the streets or to put out the burning fuse.[8]

The necessity for accurate, available and current intelligence was recognized and considered highly important in a recent Presidential Commission report. In a Supplement on Control of Disorders to the *Report of the National Advisory Commission on Civil Disorders* (U.S. Government Printing Office, 1968), the President's Commission specifically directed its attention to the gathering of intelligence in preventing civil disorders and, regarding that subject, it said:

> Intelligence—The absence of accurate information *both before and during a disorder* has created special control problems for police. Police departments must develop means to obtain adequate intelligence for *planning purposes*, as well as on-the-scene information for use in police operations during a disorder.

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[7] Plaintiffs first dispute the fact that the Army has the same detectional and preventative role as the police have (Br. 25), and then they state they recognize that the Army functions as an extension of the local law enforcement agency (Br. 24). These appear to be inconsistent positions, at best.

[8] Defendants vigorously deny that the Army's intelligence gathering activities purpose is to control dissent; nor are their activities an attempt to prepare a file of the voices of dissent in order that they may later be stilled, as plaintiffs contend. (Br. 12).

> An intelligence unit staffed with full-time personnel should be established to gather, evaluate, analyze, and disseminate information on *potential* as well as actual civil disorders. It should provide police administrators and commanders with reliable information essential for assessment and decision making. It should use undercover police personnel and informants but it should also draw on community leaders, agencies, and organizations in the ghetto. (Emphasis supplied). *Report of the National Advisory Commission on Civil Disorders, supra,* at 269.

Clearly, the only way this information can be made available to the Executive Branch and the Army or the National Guard in time for it to be used effectively when those components are called upon to exercise their police responsibilities is for the information to be gathered and placed under current analysis ahead of time. And it must be gathered by the force which will ultimately use it, for there is never sufficient time between the disorder and the subsequent Presidential order sending the armed forces to the troubled areas for the police to transmit the information to the armed forces and the armed forces then to disseminate the information to the local commanders.

What is being questioned in this case is the critical power of the government, and specifically the Executive Branch, to gather information in order to enable the government to protect both persons and property and successfully to pursue other governmental responsibilities. Unquestionably, the First Amendment rights plaintiffs cite would be meaningless were there no force capable of insuring an individual of his right to speak in peace. Although the organizers of most demonstrations ordinarily try to maintain the peace by themselves, it is an unfortunate fact that trouble can and often does occur. Windows are broken; cars, homes, and businesses are burned and looted; and individuals are hurt and killed. Unquestionably these are crimes, and when criminal events have occurred or are anticipated to occur, the right of authorities to keep informed is properly al-

lowed.[9] *Lewis* v. *United States*, 385 U.S. 206 (1966); *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Osborn* v. *United States*, 385 U.S. 323 (1966). Surveillance has even been allowed where there has been an incidental coercive effect. *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967).[10] Defendants' position where the question of

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[9] Contrary to plaintiffs' assertion concerning the power of surveillance, governmental surveillance was not the reason an injunction was granted in *Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind., 1948) (Br. 26). There, a group of union members had received permission to use a vacant court room to hold a meeting. They objected to the presence of state police in the room with them and sought an injunction to prohibit the police from entering the room. Although the court granted the injunction, the reason for the court's decision is not what plaintiffs contend. Instead, the court found that evidence clearly established the police had restrained and hampered those at the meeting, *and* the police had usurped the authority of the local authorities, since they, the police, did not have a right either to be at the meeting or to decide who was supposed to attend. This important distinction was made when the court said:

> Unless it can be said that the state police have a right to be present because of the nature of the meeting place, it is an inevitable conclusion that they have overstepped their lawful authority in asserting a right to attend these meetings. 75 F. Supp. at 625.

Thus, the court based its decision on two considerations: the actual interference by the state police when they took notes of the meeting *and* the absence of any right to be in the private meeting hall. The injunction was not granted because there was surveillance alone. In the case at bar, plaintiffs contest the right of the Army to be present at public demonstrations that may or have erupted in trouble, the basis and need for which is clearly set forth in the statutory and other authority discussed above.

[10] This case was referred to by the Supreme Court of New Jersey when it pointed out in its decision, reversing a lower court's decision, that local law enforcement surveillance procedures were proper, and that the power of surveillance is imperative. *Anderson* v. *Sills*, 56 N.J. 210 (1970). In making that finding, the court relied on the language in *United States* v. *McLeod*, *supra*. There the court found that the police had intended by sham arrests and baseless prosecutions to frustrate the right of a minority to vote. Notwithstanding such conduct on the part of the police, that court would not restrain police surveillance of public meetings and, in so deciding, stated:

> We turn next to the surveillance of the public meetings. The Government argues that the only possible reason for the

domestic intelligence is concerned is that the Executive Branch, including the Army, must be allowed to gather whatever information it reasonably believes to be necessary to enable the Army with the assistance of the other arms of the Executive Branch to perform its role when called upon to quell civilian disorders or otherwise to perform its statutory mission.

For these reasons, it is clear the intelligence activities are both proper and lawful. Plaintiffs' contentions then that the intelligence activities are unnecessary and unlawful are then without merit. (Br. 2).

II. The district court did not have jurisdiction over this cause.

Plaintiffs alleged that the district court had jurisdiction under 28 U.S.C. sections 1331, 1361, 2201, and 2202,

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presence of deputies at the meetings was to intimidate potential Negro voters. The defendants insist that they sent the deputies to the meetings solely to preserve order and to protect the Negroes.

We recognize that surveillance of meetings may tend to deter the exercise of federally guaranteed rights. *N.L.R.B.* v. *Friedman-Harry Marks Clothing Co.*, 1937, 301 U.S. 58, 57 S.Ct. 645, 81 L. Ed. 921. We cannot agree with the government, however, that the defendants' explanation of the deputies' mere presence at the meetings was so incredible as to require the trial judge to draw the inference that the real motive was intimidation or coercion. In the explosive situation prevailing in Selma in 1963, it would have been a dereliction of duty for the county not to have provided law enforcement coverage of these mass meetings. While the presence of the deputies may have had an incidental coercive effect, there was evidence of a legitimate motive. We cannot find the district judge clearly erroneous on this score. 385 F. 2d at 750.

Police may record and subsequently use what falls within their plain view. *Harris* v. *United States*, 390 U.S. 234 (1968); *Polk* v. *United States*, 291 F. 2d 230 (9th Cir., 1961); *Safarik* v. *United States*, 62 F. 2d 892 (8th Cir., 1933); *Wattenburg* v. *United States*, 388 F. 2d 853 (9th Cir., 1968); *Katz* v. *United States*, 389 U.S. 347 (1967); *McDonald* v. *United States*, 335 U.S. 451 (1948); *Boyd* v. *United States*, 116 U.S. 616 (1886); *Texas* v. *Gonzalas*, 388 F. 2d 145 (5th Cir., 1968); *California* v. *Hurst*, 325 F. 2d 891 (9th Cir., 1963); *Whitley* v. *United States*, 237 F. 2d 787 (D.C. Cir., 1956); *Brock* v. *United States*, 223 F. 2d 681 (5th Cir., 1955).

and the Constitution of the United States. They alleged that there is an amount in controversy which exceeds $10,000 (J.A. 3).

"District courts of the United States are courts of limited jurisdiction. They have such jurisdiction as Congress may have conferred upon them." *Klein* v. *Lee*, 254 F.2d 188, 190 (7th Cir., 1958). While the first basis alleged by plaintiffs as conferring jurisdiction, section 1331, can in certain cases confer jurisdiction, plaintiffs have failed to comply with part (b) of that section which provides that there must be the requisite jurisdictional amount involved. This amount must exceed $10,000, and the claim must not be speculative or incapable of measurement. *Carroll* v. *Somervell*, 116 F.2d 918 (2nd Cir., 1941). It is not enough simply to allege the jurisdictional amount is involved. *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939). There is no evidence in the record that any of the plaintiffs have a claim in fact for any amount of money, much less a claim for an amount in excess of $10,000. Here, there is no tax, fine, damages, or contract amount involved. None of the plaintiffs face the loss or denial of employment. Clearly, there is nothing in the record to support their allegation that any amount of money is involved in this matter. Even if money were involved, this court, in determining if the value of the matter involved is sufficient for jurisdictional requirements, should not consider the importance of the principle, but the monetary consequences to the parties. *Yoder* v. *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation*, 339 F.2d 360 (9th Cir., 1964). Further, it should be noted that in an attempted class action, it is impermissible to attempt to aggregate the amount of all claims of the class (assuming there are claims) to sustain a claim for the jurisdictional amount. *Hartman* v. *Secretary of Department of Housing and Urban Development*, 294 F. Supp. 794 (D. Mass., 1968). Where jurisdiction is contested, courts may not treat the requirement for the jurisdictional amount as a mere technicality, notwithstanding

the fact that the cause may involve alleged violations of plaintiffs' constitutional rights. *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir., 1964); *cert. denied*, 379 U.S. 1001 (1965). Therefore, since there is no evidence to sustain plaintiffs' contention as to the amount in controversy and it is clear from the record there is, in fact, no amount involved, this court should dismiss the action for want of jurisdiction. *Christner* v. *Poudre Valley Co-op*, 134 F.Supp. 115 (D. Colo., 1955); affirmed 235 F.2d 946 (10th Cir., 1956).

Plaintiffs' second claimed jurisdictional basis, 28 U.S.C. 1361, confers jurisdiction for mandamus actions only. That section provides that district courts shall have original jurisdiction to compel an officer or employee of the United States or any agency thereof *to perform a duty owed to the plaintiff*. It confers jurisdiction only for affirmative relief, not injunctive relief. *Harms* v. *Federal Housing Administration*, 256 F.Supp. 757 (D. Md., 1966). The only affirmative type of relief sought by plaintiffs was a request for a mandatory injunction compelling the Army to turn over to the court for destruction its intelligence data on civil disorders. In order for the mandamus provisions to apply, they must show the presence of a duty, an absolute obligation to act, in accordance with which no discretion exists. *Bowen* v. *Culotta*, 294 F. Supp. 183 (E.D.Va., 1968). Further, they must show a clearly defined duty which is ministerial in nature. *Guffanti* v. *Hershey*, 296 F. Supp. 553 (S.D. N.Y., 1969). Plaintiffs have submitted no evidence that such a duty or obligation exists; they have failed to demonstrate that the Army, in the first instance, owes them any duty to turn over its intelligence data to the court as they request. Thus, this provision of 28 U.S.C. does not confer jurisdiction in this case as plaintiffs allege.

Plaintiffs' third and fourth claimed basis for jurisdiction, 28 U.S.C. 2201 and 2202, do not confer jurisdiction on a court; they merely expand the court's function (declaratory judgments) in cases or controversies over which they already have jurisdiction under other laws. *Van Bus-*

kirk v. *Wilkinson*, 216 F.2d 735 (9th Cir., 1954). Since, as we have been discussing, the courts did not otherwise have jurisdiction, jurisdiction cannot here be based on sections 2201 and 2202 of title 28 U.S.C.

The last basis for jurisdiction cited by plaintiffs, the Constitution of the United States, does not, standing alone, confer jurisdiction on district courts. Rule 2 of the Federal Rules of Civil Procedures states that "[t]here shall be one form of action to be known as 'civil action,'" thus doing away with the distinction between courts of law and equity in the federal system. As indicated earlier, 28 U.S.C. 1331 provides that district courts shall have original jurisdiction in all civil actions provided the amount in controversy exceeds $10,000. In the absence of such an amount, courts have refused to entertain a suit on the basis of unsupported allegations of violations of one's constitutional rights. *Giancana* v. *Hoover*, 322 F.2d 789 (9th Cir., 1963); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir., 1964); *cert. denied*, 379 U.S. 1001 (1965).[11]

For these reasons, none of the bases cited by plaintiffs conferred jurisdiction on the lower courts or as a result on this court to decide this cause and, therefore, the result of Judge Hart's decision to dismiss the action was proper.

III. Plaintiffs failed to present the lower court with a justiciable controversy[12] the court could decide.

Even if we assumed *arguendo* that the court below possessed subject matter jurisdiction, it was correct in dismissing the case since the complaint failed to present a justiciable controversy.

Recognizing the confusion which often exists between the terms *jurisdiction over the subject matter* and *justici-*

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[11] In *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (5th Cir., 1967), discussed *infra*, Judge Medina specifically refused to grant appellants relief for unconstitutional infringements of their rights in the absence of evidence of and a finding that the requisite $10,000 amount was involved.

[12] This concept will be discussed in Part IV of defendants' argument, as well.

able controversy, Chief Justice Warren, speaking for the Supreme Court in *Powell* v. *McCormack*, 395 U.S. 486 (1969), outlined the differences between the two concepts. Iterating the language in *Baker* v. *Carr*, 369 U.S. 186 (1962), the Chief Justice said that a court must first find subject matter jurisdiction and then, once jurisdiction is found, consider whether the subject presented is justiciable. In that regard, the Court said:

> In deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" 395 U.S. at 517.

Thus, justiciability requires that plaintiffs demonstrate that the following are *judicially identifiable*: a right in the plaintiffs, a duty of the defendants, a breach of that duty, and a remedy within the power of the court. Here, plaintiffs allege ". . . the rights of free speech and associations, the right to petition their government for redress of grievances, and the right of privacy . . ." are involved (J.A. 8). They further allege, in substance, that the U.S. Army has a duty not to interfere with those rights; that the Army, by gathering intelligence data, has breached that duty; and that the court can grant relief by ordering the Army to halt such activities and to destroy all such records.

Defendants do not contest plaintiffs' allegations that they possess constitutional rights. What we do contest is plaintiffs' assertion that the Army has either the duty they described or, if so, that it has breached the duty. Assuming at this point that such a duty exists, what then is the nature of the breach? Have they been publicly identified with their ideas by the Army (Br. 15) or had their conduct regulated by statute (Br. 19)? Were they required to identify themselves or their publications (Br. 21), sign a card in order to protest (Br. 26), disclose to the Army their private records (Br. 32), pay a tax for their right of expression (Br. 27), commanded to be silent (Br. 29),

threatened with or actually dismissed from their jobs (Br. 31), required to wear identifying armbands (Br. 32), fill out a questionnaire (Br. 33), or prosecuted or denied a license (Br. 37)? No, none of these has happened. Instead, plaintiffs allege that the Army has breached its duty because they, plaintiffs, are afraid—afraid of the unknown.[13] In summing up their position, plaintiffs say:

> There is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski, supra.* There is a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the defendants' civilian intelligence network (Emphasis supplied) (Br. 40).

In substance, then, plaintiffs claim that they do not know what can or might be done with the Army's information, and, for that reason, they are afraid to exercise rights protected by the Constitution. But the fact that plaintiffs are afraid, standing alone, is not enough to demonstrate the requisite *judicially identifiable* breach of a duty required to present a justiciable controversy a court

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[13] In discussing their fears, plaintiffs contend that where constitutional issues are involved, one need not wait until he is directly subjected to the force of a law before he can challenge it (Br. 37-38). There is an equally accepted correlation to their position as well.

> ". . . the mere existence of a statute, regulation, or articulated policy is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms. *National Student Association* v. *Hershey,* 412 F. 2d 1103, 1110 (D.C. Cir., 1969). See also *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 (1945); *Watson* v. *Buck,* 313 U.S. 387 (1941); *Lion Manufacturing Corp.* v. *Kennedy,* 330 F.2d 833 (D.C. Cir., 1964).

Actually, neither maxim advances either side of the case at bar to any great extent, for here, as will be discussed *infra,* there is at issue no law which is or may be directed against plaintiffs.

can review.[14] Virtually every government activity creates fear in the hearts of some individuals, but fear alone is not enough; there must be a real threat.[15] As discussed previously, the Army's activity is directed only against those who would prevent plaintiffs from speaking; it is directed toward preventing those whose activity would destroy rather than build.[16] The Army has not threatened

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[14] Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946); *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1 (1960); *Lampkin* v. *Connor*, 360 F. 2d 505 (9th Cir., 1966); *Garcia* v. *Brownell*, 236 F. 2d 356 (9th Cir., 1956); *Brown and Root* v. *Big Rock Corporation*, 383 F. 2d 662 (5th Cir., 1967); *Danville Tobacco Association* v. *Freeman*, 351 F. 2d 832 (D.C. Cir., 1965) and *American Dietaids Co.* v. *Celebrezze*, 317 F. 2d 658 (2nd Cir., 1963).

[15] Although plaintiffs rely on *Stamler* v. *Willis*, 415 F. 2d 1365 (7th Cir., 1969) to support their contention that ". . . allegations of serious and substantial constitutional violations by government activity present a conflict susceptible of judicial resolution" (Br. 36), their contention is incomplete. Simple allegations standing alone are not enough; there must be sufficient evidence to render a degree of credibility to the allegations. See *National Student Association* v. *Hershey*, 412 F. 2d 1103 (D.C. Cir., 1969). In *Stamler* there was such evidence; here there is not. See also *Frothingham* v. *Mellon*, 262 U.S. 447 (1923) and *Flast* v. *Cohen*, 392 U.S. 83 (1968), in which the Court said that one may not seek to employ a federal court as a forum in which to air his general complaints about the conduct of the government or the allocation of power in the Federal System.

[16] The government is not commanding silent obedience by keeping an eye on potentially troublesome demonstrations as plaintiffs contend (Br. 29). Instead, it could be reasonably concluded that such activity by the Army and others has fostered peaceful dissent and protest. As the record and common knowledge demonstrates, the role of the Army, with respect to civilian activities, has developed to its present state only within the past few years. During that same period, our nation has witnessed an unprecedented growth in individual expression of dissent of all types. Be it on the campuses, the Mall, 5th Avenue in New York or innumerable other locations, citizens by the hundreds of thousands are speaking out on vital issues such as civil rights, the Viet Nam war, and patriotism, to name just a few. Not too many years ago, such expression was all but unheard of. It cannot be denied that such mass activity would not long exist in an atmosphere where a protester feared he may be hurt or killed. Clearly, then, one of the reasons so many people are speaking out despite the violence which has occurred is their confidence in local law enforcement officers, the Army, and the

plaintiffs in any way which would justify their fears nor have plaintiffs presented any evidence of such a threat.[17] In the final analysis, the intelligence information gathered by the Army has nothing to do with them beyond insuring they will be able to speak out in peace. In gathering this information, the Army neither has a duty, described by plaintiffs and, even assuming it does, it has not breached that duty by its activity. For these reasons plaintiffs have failed to present a justiciable controversy to the lower court in their complaint (Br. 36).

IV. Plaintiffs have failed to present a claim upon which relief can be granted.

Assuming *arguendo* that this court could find both jurisdiction and a justiciable controversy, the dismissal of the complaint must be affirmed, for plaintiffs have failed to present a claim upon which relief could be granted.

Although plaintiffs direct their complaint primarily against the intelligence activities of the Army, they have indicated that all government intelligence activities of this type chills the exercise of their constitutional rights (Br. 12).[18] Defendants, on the other hand, contend the court,

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President that the government will do everything it can to protect each citizen's safety during his protest. To that extent, the Army has not inhibited free speech. It helps protect it.

[17] A review of plaintiffs' evidence reveals the sum and substance of their "proof" is as follows: 13 articles from various newspapers and magazines; 7 letters or memoranda either from or to various personnel connected with the Army in which it is requested and the Army explains the purpose and extent of its intelligence activities; copies of three speeches by members of Congress; and one affidavit of plaintiffs' counsel, Lawrence Speiser, setting forth his opinion, in effect, why plaintiffs should have been granted an injunction. There is not one iota of evidence to prove that the Army intends to use improperly any information it has collected as plaintiffs allege. Instead, all the evidence concerns is the fact that the Army has collected some data for use in quelling disturbances only.

[18] See also *Anderson* v. *Sills*, 106 N.J. Super. 545 (Ch. Div. 1969); reversed 56 N.J. 210 (1970). There, a lower court entertained a suit of this type and granted the plaintiffs in that case the injunctive relief they sought. Subsequently, the State Supreme Court reversed the lower court's decision.

under the doctrine of separation of powers,[19] does not have the power to issue such an order and, even if it did, the issuance of such an order would foster disorder with disastrous results. Furthermore, were the court to attempt to preclude just the Army from collecting such data, the Army would be then less able to carry out the President's orders and its resulting responsibilities, when they are called upon to assist local officers in restoring order. At best this would be an unconstitutional infringement on the Executive Branch's functions. For these reasons, defendants contend that plaintiffs have failed to present a claim upon which relief can be granted.

V. The plaintiffs have not shown that the chilling effect doctrine applies to the Army's conduct in this case.[20]

Reduced to its essence, plaintiffs' First Amendment claim is that the Army's intelligence activities, as set forth earlier, have a chilling effect on lawful expression of political protest and, therefore, they constitute an unconstitutional infringement on the rights of free speech and association. (Br. 41). Defendants' position is that the chilling effect doctrine does not apply in this case, because the plaintiffs have failed to present a justiciable

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[19] The executive function is to enforce the law. *Quinn* v. *United States*, 349 U.S. 155 (1955). The doctrine of separation of powers requires that one branch must not interfere in another's function. *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923). To halt such intelligence activities would interfere with the power to enforce the law, vested in the Executive Branch.

[20] In this regard, it should be noted that plaintiffs, on one hand, contend that the Army's intelligence activities have a chilling effect on the exercise of their rights, and then, in court through counsel, said: "Our Plaintiffs this morning, for example, are not people, obviously, who are cowed and chilled . . ." indicating that plaintiffs have not, in fact, been chilled and, therefore, they have no standing to complain. See also, *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968) discussing *Baker* v. *Carr*, 396 U.S. 186, 204 (1962) requiring parties to have "a personal stake in the outcome of the controversy." and *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937) requiring parties to have an "adverse legal interest."

controversy, discussed earlier.[21] In order to clarify defendants' position, a brief discussion of the development of the chilling effect doctrine and the resulting change in the concept of a justiciable controversy would be in order.

Although *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), antedated the chilling effect concept, it played an important part in the doctrine's development. In *Mitchell*, the Court was faced with a First Amendment issue raised by the threatened application of one of the Hatch Act's provisions, removal of an appellant from his government position. One of the appellants in that case had violated the provisions of the Act, while the remaining appellants had simply expressed a desire to do so, by engaging in the type of political activity proscribed by the Act. In limiting its decision to the issues raised by the one who had violated the Act, the Court said:

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions are requisite.' 330 U.S. at 89.

Continuing, the Court held that:

> This proceeding so limited meets the *requirements* of defined rights and a *definite threat to interfere* with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint. (Emphasis supplied) 330 U.S. at 92. Also see, *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270 (1941); *Altvater* v. *Freeman*, 319 U.S. 359 (1943); *Nashville Ry.* v. *Wallace*, 288 U.S. 249 (1933).

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[21] Since justiciability is an integral part of the chilling effect doctrine, it will be discussed here, as well, as was indicated earlier in note 12.

Earlier, the Court in *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273 (1941) had recognized that ". . . it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." Yet, the Court in *Mitchell* did lay down some guidelines which could be used to determine if a justiciable controversy were present in cases where constitutional rights were threatened. First, the Court discussed the threat faced by the appellants who had not violated the Act and said:

> [T]he *general* threat of *possible* interference with those appellants' rights by the Civil Service Commission under its rules . . . does not make a justiciable case or controversy.
>
> * * * *
>
> The power of courts and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against *actual interference. A hypothetical threat is not enough.* . . . It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality between the freedom of the individual and requirements of public order except when definite rights appear on the one side and definite prejudicial interferences upon the other (Emphasis supplied). 330 U.S. at 89-90; *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) and cases cited; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U.S. 129 (1946).

The Court then characterized the nature of the threat faced by those appellants who had not violated the Act and found that

> [t]he *threats* which menaced the affiants of these affidavits in the case now being considered are closer to a *general threat* by officials to enforce those laws which they are charged to administer . . . than they are to the *direct threat* of punishment against a named organization for a contemplated act that

made the *Mail Association*[22] *and the Hill*[23] *cases justiciable.* (Emphasis supplied). 330 U.S. at 88.

Although the type of threat faced was an important consideration in the Court's rejection of all but one of the appellants' positions in *Mitchell* (and will be discussed in more detail later), what is more germane at this point is the test the Court, in *Mitchell*, originally adopted.

As interpreted by this court in *National Student Association* v. *Hershey*, 412 F.2d 1103 (D.C. Cir., 1969), *Mitchell's* test spread the question of justiciability along a continuum of general to direct threats. "Suits predicated on threats nearer the 'general' pole are not justiciable; suits nearer the direct pole are." *Hershey, supra*, 412 F.2d at 1111.

Eighteen years after *Mitchell*, the Supreme Court decided *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). There, appellants complained of harassment by public officials resulting from their efforts to protect the civil rights of Negroes in various Southern states. Specifically, they sought an injunction restraining appellees from prosecuting or threatening to prosecute them for alleged violations of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. In its decision, the Court recognized "the chilling effect on free expression of prosecutions initiated and threatened. . . ." 380 U.S. at 487. The reason the Court granted appellants the relief they sought is pertinent here. In *Dombrowski*, the Court enjoined *the enforcement of a statute patently unconstitutional on its face which had been invoked by local authorities in bad faith in an effort to discourage the plaintiffs from exercising their constitutional rights.* Conversely, in *Cameron* v. *Johnson*, 390 U.S. 611 (1968) the Court refused to enjoin the enforcement of an anti-picketing law and said:

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[22] *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (1945).

[23] *Hill* v. *Florida*, 325 U.S. 538 (1945).

> Any chilling effect on the picketing as a form of protest and expression that flows from the *good faith* enforcement of this *valid statute* would not, of course, constitute that enforcement an impermissible invasion of protected freedoms (Emphasis supplied). 390 U.S. at 619.

Now consideration was being given not only to a general versus a direct threat set forth in *Mitchell*, but in addition the Court looked at the validity of the statute involved and the nature of its enforcement, as well.

In *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (5th Cir., 1967), the court considered the issue whether or not the appellants in that case had presented a justiciable issue cognizable to the court. There, appellants contested the validity of their reclassification by their local draft board. In deciding that issue, Judge Medina said that ordinarily such a claim would not be ripe for adjudication since reclassification standing alone was not, normally, a sufficient injury. However, the court noted that the reclassifications were the *direct result* of appellant's protest activities. The court then found that reclassifications based upon protest activity had the effect of immediately curtailing the exercise of First Amendment rights and for that reason it found that the board had exceeded its jurisdiction. More pertinent to this case is the court's finding that it was not the reclassification activity, *per se*, which the court found to constitute the necessary injury to sustain a justiciable issue; rather, it was the direct connection between voicing dissent and subsequent reclassification that constituted the injury; in short, the court found a valid statute but bad faith enforcement.

Although not expressly set forth and stated as such, *Wolff* contains the underlying concepts behind the chilling effect doctrine. In the *Hershey* case, *supra*, which followed, this court contributed substantially to the doctrine. There, the issues involved arose from the so-called Hershey directive. That directive in effect called for the reclassification of war protesters as a result of their

exercising their First Amendment right of freedom of expression. In view of the obvious chilling effect that that policy would have on those young men who would voice dissent, this court held that the policy in the directive pertaining to reclassifications was contrary to law. *Hershey* also contained some of the limits of the chilling effect concept. In confirming that the chilling effect doctrine was not open-ended, this court said:

> Nonetheless, for a number of reasons we are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy. 412 F.2d at 1113-1114.

Continuing, this court mentioned the *Mitchell* test and held that not every kind of chilling effect hardens general threats into justiciable controversies:

> [w]here there is only a 'general threat of enforcement' not every chilling effect on protected expression resulting from the threat creates a justiciable controversy. 412 F.2d at 1115.

Next, this court set forth its guidelines for determining whether a given chilling effect is sufficient:

> (1) the severity and scope of the alleged chilling effect on First Amendment freedoms, (2) the likelihood of other opportunities to vindicate such First Amendment rights as may be infringed with reasonable promptness, and (3) the nature of the issues which a full adjudication on the merits must resolve and the need for factual referents in order properly to define and narrow the issues. These considerations become relevant, of course, only if the plaintiffs plausibly allege that they are in fact vulnerable to the alleged chilling effect. 412 F.2d at 1115.

But more important here was this court's search for a threatened activity when searching for justiciability. In its search, this court said:

> . . . it is possible that in such cases courts may rely on a *credible* threat of enforcement and plausible

> allegations of intent or desire to engage in the *threatened activities* as sufficient predicates for justiciability. (Emphasis supplied). 412 F.2d at 1111-1112.

Thus it is clear from the decision in *Hershey* that although the point separating a justiciable controversy from a non-justiciable one may have moved toward the "general threat pole" as indicated in the cases following *Mitchell*, it has not reached the end of the continuum. Instead, a court still has to consider the general-direct threat test as well as to look for an invalid statute and/or bad faith enforcement. With this in mind, we would direct the Court's attention first to the nature or type of threat faced by plaintiffs at bar; and, more specifically, is it a general or a direct threat? Although plaintiffs' words were set forth previously, they bear repeating here:

> There is something more subtle at stake than the threat of prosecution and criminal sanctions present in *Dombrowski, supra.* There is a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of information gathered and recorded in connection with the defendants' civilian intelligence network. (Emphasis supplied) (Br. 40).

Clearly, the alleged threat faced by plaintiffs is at best, general; to be more accurate, it is unknown. Unquestionably, they allegedly possess a fear; but in this case, the fear does not flow from a real, definite threat. Here, this Court, if it is to apply the chilling effect doctrine, needs to find a well-defined threat that a specific and ascertainable result will occur if the contemplated act were to be done by the plaintiffs. That plaintiffs' fertile imagination has raised every conceivable use to which the Army may put the information, including raising the specters of Nazi SS troops and Russian NKVD, is not subject to debate. But there is no such threat here, no *credible threats* to which *Hershey* referred.[24] Unlike the infamous organizations of terror

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[24] 412 F. 2d at 1111.

referred to by plaintiffs, the Army's activities are well supervised by three civilian heads of the government under the direct control of the President.

In considering the nature of the threat plaintiffs allege they face, the court should also consider the Hershey test, whether there is a valid statute and, if so, whether there is any evidence of any bad faith enforcement of the statute. Here, there is no statute imposing criminal liability for its violation, as in *United States* v. *Robel*, 389 U.S. 258 (1967); *Dombrowski* v. *Pfister*, *supra*; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Watkins* v. *United States*, 354 U.S. 178 (1957); *United Public Workers of America* v. *Mitchell*, *supra*; or a statute affecting the right to employment, *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589 (1967); or to pursue a profession, *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961). The Army's intelligence activity imposes no liability or obligation whatsoever upon the plaintiffs beyond what they imagine. That they feel a breath of cold air from the Army's activity is not dispositive of this case. Unquestionably, the existence of courts, the presence of the policeman on the street corner at night, the conducting of a security investigation, and myriad other things and activities may, in one way or the other, chill an individual.[25]

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[25] A clear distinction should be made at this point regarding plaintiffs' loss of anonymity. Plaintiffs are not compelled to disclose any information; nor is the method used to gather the information being seriously contested. Instead, plaintiffs object to the simple act of gathering and storing the intelligence data as it affects their right to remain anonymous. (Br. 21). Yet, those who would protest and demonstrate elect publicity by presenting their views actively in the public arena and, in so doing, deliberately expose themselves to the public. See *Associated Press* v. *Walker*, 388 U.S. 130 (1967). Clearly then, plaintiffs by their own choosing elect to lose their anonymity by speaking out in public; and the recording of their activities by the armed forces does not invade their privacy any more than does a newspaper, radio, or television story. Indeed, since the Army does not disclose the data to the public, it can be said the Army invades their privacy less than does the fourth estate.

Where First Amendment rights are concerned, if there is no expressed or implied intent to control speech and if the conduct is legal, it should be allowed in the face of an overriding public need, even though the conduct operates incidentally to limit the unfettered exercise of First Amendment rights. *In re Marvin*, 53 N.J. 147, 152-153 (1969), *cert. denied* 396 U.S. 821 (1969).[26] If a properly drawn measure is within the constitutional power of the government, if it furthers an important or substantial government interest, and if the interest is unrelated to the suppression of free speech, the incidental restriction on alleged First Amendment rights is insufficient to overturn the measure. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Cameron* v. *Johnson*, 390 U.S. 611, 619 (1968). To deny the government, in this case the Executive through the armed forces, the power to gather necessary information to fulfill its mission to maintain order, and base such a denial on the fear that the Army may one day run amuck with the information is, at best, folly. It would in effect foster tyranny and unlawful conduct in exchange for relief from the imagined threat that the armed forces may engage in such tyranny on its own at a later time. Such a result would be disastrous, at best. Plaintiffs have not provided or offered one iota of evidence that the Army's purpose is in fact what they purport it may possibly be. Conjecture alone is not a proper basis for the judiciary to interfere with the President's and the Army's attempt to protect the lives and the property of our citizens. For these reasons, plaintiffs have failed to present in their complaint an issue "in the context of

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[26] Cf. *Konigsberg* v. *State Bar of California*, 366 U.S. 36, wherein the Court said:

> General regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First and the Fourteenth Amendment forbade Congress and the States to pass, when they have been found justified by subordinating valid government interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. 366 U.S. at 50-51 (1961).

a specific live grievance" required in a proceeding under the Declaratory Judgment Act. *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). They have failed to show either a direct threat, an invalid statute, or bad faith enforcement of a valid statute. Therefore, the chilling effect doctrine does not apply.

It is clear from the foregoing that plaintiffs seek an extension of the chilling effect doctrine. They would ask this Court to do away with the general-versus-direct threat test. They would ask the court not to look to the validity of a statute or, for that matter, to look for a statute at all. Nor do they want this court to consider whether there is any bad faith enforcement present. Instead, they would seek relief based simply on their fear of a lawful government activity. Were this Court to grant relief on this basis, the result would be an opening of the floodgates of litigation based solely on individual fears of government activity. Clearly, this should not and cannot be.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

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ARLO TATUM, *et al.*,

Appellants,

—v.—

MELVIN LAIRD, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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I.

The District Court had jurisdiction over this action.

There is widespread confusion in the federal courts about the applicability of Sec. 1331(a) to suits based upon claims that federal officers have invaded constitutional liberties which have no readily ascertainable monetary value.

The Supreme Court, as well as other federal courts, have long dealt on the merits with such cases without inquiring whether the jurisdictional amount required by Sec. 1331(a) was satisfied. In *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1965), for example, where the right to a passport was at issue, and in *Schneider* v. *Rusk,* 377 U.S. 163 (1964), where a woman's citizenship was at issue, no question was

raised under Sec. 1331(a), although it is no less difficult to capitalize the value of the right to travel abroad or the right to hold U. S. Citizenship (apart from any commercial advantages those two conditons might afford) than the right to exercise First Amendment rights as in this case. Nor was the issue raised in *Quaker Action Group* v. *Hickel,* —— F.2d —— (D.C. Cir. 1970), involving an action for a declaratory judgment against Department of the Interior regulations restricting picketing in front of the White House, or in *Thompson* v. *Clifford,* 408 F.2d 154 (D.C. Cir. 1968), an action for declaratory and injunctive relief against the Secretary of Defense who had prohibited the burial of an Army veteran in Arlington Cemetery because of his association with the Communist Party. And see this Circuit's recent decision in *Davis* v. *Ichord,* —— F.2d —— (1970). On other occasions judges gloss it over as, for example, in *Breen* v. *Selective Service,* 406 F.2d 636, 637 n. 1, where the Second Circuit, referring to the jurisdictional amount, said "The Government has made no point about this nor shall we."

On the other hand, Sec. 1331(a) is sometimes raised by the United States Attorney as a bar to jurisdiction. Occasionally, the challenge is taken seriously by the courts and becomes the ground for decison. Cf. *Oestereich* v. *Selective Service,* 393 U.S. 233, 239 (1968).[1]

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[1] Subsequent to the remand in *Oestereich,* the government chose to ignore both the Supreme Court's direction that Oestereich "demonstrate that he meets the jurisdictional requirements of 28 U.S.C. §1331," and its own initial assertion that the suit was barred by that statute. Instead, Mr. Oestereich, who was represented throughout by one of the undersigned attorneys, was issued a new IV-D classification card and the suit was dismissed in the District Court by stipulation.

It is clear that there is substantial confusion over the application, if any, of Sec. 1331(a) to cases such as the one at bar. The uncertainty has been increasingly articulated by eminent federal judges. See *Wolff* v. *Selective Service,* 372 F.2d 817, 826 (2 Cir. 1967) (Senior Judge Medina); *Fein* v. *Selective Service System Local Bd. No. 7,* 430 F.2d 376 (2 Cir. 1970) (dissenting opinion of Chief Judge Lumbard); *Giancana* v. *Johnson,* 335 F.2d 366, 371 (7th Cir. 1964) (dissenting opinion of Judge Swygert), *cert. denied,* 379 U.S. 1001 (1965); *Boyd* v. *Clark,* 287 F. Supp. 561 (S.D.N.Y. 1968) (dissenting opinion of Judge Edelstein),[2] *affirmed on other grounds,* 393 U.S. 318 (1969);[3] *Murray* v. *Vaughn,* 300 F. Supp. 688 (D.R.I. 1969) (Judge Pettine).

The Supreme Court has asserted in *Hague* v. *C.I.O.,* 307 U.S. 496, 529 (1939), that freedom of speech and assembly "are not capable of money valuation."[4] Assuming that that view still has merit, there would of course be obvious practical difficulties in assessing the precise value of an intangible right such as that asserted by appellants in this case. But this is surely not to say that the rights are with-

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[2] Judge Edelstein said (287 F. Supp. at 568):

> This is not the nineteenth century where property rights were valued over human rights. If a man can sue in federal court on the allegation that the government is injuring his property, he certainly must be allowed to sue on the allegation that the government is oppressing him personally.

[3] The judgment was affirmed "without reaching the jurisdictional question raised under 28 U.S.C. §1331." Compare *Oestereich* v. *Selective Service, supra.*

[4] Insofar as *Hague* implies that jurisdiction cannot be had under the predecessor to Sec. 1331(a) in equity cases involving constitutional rights, it must be treated as dictum since jurisdiction was found to exist under the Civil Rights Acts. The Supreme Court presumably believes the question is still open. *Boyd* v. *Clark, supra.*

out any value.[5] Indeed, the Supreme Court has explicitly held that a dollar value can be attached to the constitutionally protected right to vote, a right whose financial value is as intangible as plaintiffs' rights. *Giles* v. *Harris,* 189 U.S. 475 (1903); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900). Other personal rights are also susceptible of capitalization. *Monroe* v. *Pape,* 365 U.S. 107 (1961); *Bell* v. *Hood,* 327 U.S. 678 (1946).

Any other result leads to the irrational conclusion that although invasions of constitutionally protected rights by state officials are subject to plenary judicial power, federal officers would be immune from judicial sanction in equitable cases for precisely the same illegal conduct. That, as the Supreme Court said in *Hague* v. *C.I.O.,* 307 U.S. at 530, would be "absurd." It would also be dangerous.

The position plaintiffs urge is supported by the purpose of Sec. 1331 and by our federal system of government. Judge Edelstein observed in his dissent in *Boyd* v. *Clark, supra,* that two general and related purposes are advanced by the jurisdictional amount requirement. First, it advances the interest of federalism by insuring that the federal courts will not intrude upon the "rightful independence of state governments" by adjudicating controversies that should be determined in the state courts. See *Healy* v. *Ratta,* 292 U.S. 263, 269-70 (1934). This interest is obviously not advanced by denying appellants a federal forum. There is obviously no state court which could properly entertain this litigation.

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[5] Constitutional rights would seem no more intangible than "pain and suffering" in a personal injury case or "damage to reputation" in a defamation action, which juries have no trouble capitalizing every day.

The other purpose of the jurisdictional limitation was explained in the Senate Report which accompanied the bill raising the amount to $10,000:

> The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies. S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), 1958 U.S. Code Cong. Ad. News, pp. 3099, 3101. [Quoted in *Giancana* v. *Johnson,* 335 F.2d. at 368-69, n. 7.]

Thus, the second purpose of Sec. 1331 is to keep "small" cases in the state courts where they belong. Such a purpose is not served by denying jurisdiction to a case involving fundamental federal rights where there is no alternative state forum available.

In recognition of the fact that the amount in controversy requirement had the potential for denying a federal forum to cases most deserving of it, the American Law Institute recommended that the requirement be eliminated in federal question cases:

> . . . the stated requirement of an amount in controversy in fact has relatively little impact on the volume of federal question litigation. The few cases there are, however, that must satisfy the §1331 requirement are likely to involve matters *particularly deserving of a*

> *federal forum.* E.g., *Giancana* v. *Johnson* . . . . Cases in which the plaintiff claims violation of his constitutional rights by action of a federal official warrant federal cognizance without the need of demonstrating that the requisite amount is in controversy. [ALI, Study of the Division of Jurisdiction Between State and Federal Courts, 172 (1969) (emphasis added).]

Though Congress has not acted on this recommendation, the vindication of the kinds of rights which the plaintiffs assert cannot await such action. Nor should such action be awaited where, as here, the very purpose of the grant of federal question would be frustrated by decisions such as the government here urges. Unless the question is resolved, suits over rent reductions by municipal officials, for example, will be cognizable in the federal courts, see *Eisen* v. *Eastman,* 421 F.2d 560, 566-67 (2d Cir. 1969), but controversies over the denial of constitutional liberties by federal officials will not be.

If Sec. 1331 is held to bar suits such as these, serious constitutional questions are presented.

Such questions were raised and explored by the dissent in *Boyd* v. *Clark, supra,* and by the court in *Murray* v. *Vaughn,* 300 F. Supp. at 694-96.[6] Most recently, they have been raised by Chief Judge Lumbard in his dissenting

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[6] Judge Pettine said:

> In summation, it is probable that if §1331's amount in controversy proviso bars this court from reaching the merits of this case, a plaintiff who alleges injury to those rights which occupy the highest position in the pantheon of our constitutional values would be left without judicial process of law. As so applied, §1331 might well be deemed to violate both the due process clause of the Fifth Amendment and Article III, §2 of the Constitution. . . ."

opinion in *Fein* v. *Selective Service System Local Bd. No. 7, supra* at 385:

> Since Fein clearly can sustain his jurisdictional allegation, I need not consider the case of a poor man who stands to lose nothing but his most precious personal liberties if the unconstitutional actions of the federal government are beyond the reach of the courts. But if that case ever comes before us, I have grave doubts that the old rule requiring that claimed deprivation be capable of monetary valuation would long endure.

In the first section of Article III of the Constitution, the judicial power of the United States is vested in the Judiciary. The second section of Article III of the Constitution extends the judicial power to all cases in law and equity which arise under the Constitution and the laws of the United States. There is nothing in Article III about amount in controversy. The Bill of Rights defined certain rights which are not to be abridged by Congress or denied in any manner unless by due process of law. Nothing in the Bill of Rights indicates that the rights were to be conditioned on economic loss. The plaintiffs have alleged that the defendants abridged their constitutional rights under the First Amendment of the Constitution and unless restrained that the defendants would continue to do so. Plaintiffs are without any judicial forum to litigate the merits of their case apart from the federal courts. The question must then be faced whether Congress, by enacting Section 1331, can prevent a portion of the judicial power of the United States from vesting anywhere by conditioning vindication of constitutional rights on demonstrable economic loss. An affirmative answer, if not in

conflict with the applicable decisions of the Supreme Court and with the purpose of the statute, is in conflict with the Constitution.

II.

Plaintiffs' claim is justiciable.

One of the critical threshold questions presented for decision in this case is whether a First Amendment chilling effect emanating from the actual operation of a policy and system[7] attacked for its overbreadth creates a justiciable case or controversy.

Plaintiffs contend that their claim is justiciable and that the Government misinterprets and misapplies the chilling effect doctrine. Before proceeding, however, it is important to articulate the meaning and form of the concept of justiciability and its relationship to the chilling effect doctrine in First Amendment cases.

Noting that "[j]usticiability is itself a concept of uncertain meaning and scope. . . .", former Chief Justice Warren in *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968), characterized it as "the term of art employed to give expression to . . . [a] dual limitation placed upon federal courts by the case-and-controversy doctrine" embodied in Article III to the Constitution:

> In part those words ["'cases' and 'controversies'"] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the

[7] The statutory authority and departmental directives relied upon by the defendants are set forth in the Government's brief at pp. 3-6.

> role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. . . . [392 U.S. at 95.]

But the limitations imposed upon the jurisdiction of federal courts are not prescribed solely by the constitutional requirements of Article III. Justiciability "has become a blend of constitutional requirements and policy considerations" making that doctrine "one of uncertain and shifting contours." 392 U.S. at 97. The policy limitations are "not always clearly distinguished from the constitutional limitation," *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953), and it is therefore "often difficult to ascertain where the outlying fortifications [the 'numerous additional nonconstitutional rules of justiciability which guard the approaches to the constitutional' fortress] end and the citadel begins." *National Student Association* v. *Hershey,* 412 F.2d 1103, 1112, n. 26 (D.C. Cir. 1969) (hereinafter *NSA* v. *Hershey*).

Whether the rules of justiciability subsumed under the case or controversy requirement are deemed to be of constitutional or subconstitutional proportions (and they include advisory opinions, federal abstention, mootness, political questions, ripeness, and standing), it is clear that this court must decide whether " 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient *immediacy and reality* to warrant the issuance of' " judicial relief, *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Oil Co.,* 312 U.S. 270, 273 (1941) (emphasis supplied), and if the dispute has reached pressing and concrete form, *i.e.,* is ripe for judicial evaluation.

In determining whether a controversy is ripe for adjudication the court should examine two important underlying concerns: whether the case has concretized into claims with such specificity that they may be readily adjudicated, *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961), and whether a disputant faced with no more than the possibility of adverse action thereby suffers a present injury serious enough to justify a remedy. *United States* v. *Los Angeles & S.L.R.R.,* 273 U.S. 299, 309-10 (1927); Comment, 83 Harv. L. Rev. 690, 692 (1970). These considerations overlap one another to the extent that a dispute will not achieve the required threshold level of specificity where the threat of adverse action appears remote. And furthermore, it is unlikely that a controversy will be deemed to be fraught with "sufficient immediacy and reality," *Golden* v. *Zwickler, supra,* and thus nonjusticiable, where the injury claimed is alleged to result from the mere drawing board existence of a policy coupled with only a general threat of its application or enforcement. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 460-62 (1945). As noted by this Circuit in *NSA* v. *Hershey,* 412 F.2d at 1111:

> The [Mitchell] Court spread the justiciability question along a continuum ranging between "a general threat by officials to enforce those laws which they are charged to administer" and a "direct threat of punishment against a named [party] * * * for a completed act." Suits predicated on threats nearer the "general" pole are not justiciable; suits nearer the direct pole are. *United Public Workers* v. *Mitchell,* 330 U.S. at 88.

It is important to observe at this juncture that the considerations set forth above and which bear upon the determination of whether a justiciable case or controversy exists have been tempered by the growth and development of the chilling effect doctrine in First Amendment cases. It is unnecessary, however, to trace that development in order to make clear several fundamental principles which, although mentioned in both the plaintiffs' and the Government's main briefs, merit reassertion.

First, " . . . a plaintiff need not invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *NSA* v. *Hershey,* 412 F.2d at 1110, citing at 1110, n. 19, *Reed Enterprises* v. *Corcoran,* 354 F.2d 519, 523-24 (1965), and other authorities. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Second, "suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with First Amendment interests." *NSA* v. *Hershey,* 412 F.2d at 1113, n. 29, citing *Moore* v. *Ogilvie,* 394 U.S. 814 (1968), *Golden* v. *Zwickler, supra,* and *Reed Enterprises* v. *Corcoran, supra.*

This resulting change in the concept of justiciability in First Amendment cases has been prompted by the recognition of "changing philosophies of the judicial function," *NSA* v. *Hershey,* 412 F.2d at 1114, and the fact that expressional and associational rights protected by the First Amendment are so very fragile and the free exercise thereof so readily impeded and inhibited. As this Circuit stated in *NSA* v. *Hershey,* 412 F.2d at 1111-12:

> The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interests if he *does not* speak or act as he says he wants to. In addition, this injury may result from the threat of enforcement itself, even if that threat never materializes. . . .

For these reasons, this Circuit has noted that the *Mitchell* doctrine—which "antedate[d] the discovery and development of the chilling effect doctrine"—has been undermined significantly. 412 F.2d at 1114. And although it was carefully noted in *NSA* that not any First Amendment chilling effect alleged by a plaintiff will establish a justiciable case or controversy, it was said that in certain First Amendment cases "courts may rely on a credible threat of enforcement and plausible allegations of intent or desire to engage in the threatened activities as sufficient predicates for justiciability." 412 F.2d at 1111-12. See *Straut* v. *Calissi,* 293 F. Supp. 1339 (D.N.J. 1968) (three-judge court).

As will be made more readily apparent in what follows, the judicial branch must not abstain from reaching the merits of this controversy on the ground of failure to satisfy the requirements of the justiciability doctrine. The competing claims are specific and clearly amenable to judicial evaluation, and the dispute is ripe for adjudication.

A. *The Pre-*Dombrowski (Mitchell) *Doctrine Is Inapplicable in This Case.*

It is of the utmost importance that it be recognized at the outset that what plaintiffs contend is not that they are faced with the mere possibility or threat of adverse

action; rather, they vigorously assert that their claim is a facial attack upon an overly broad policy of surveillance by the military arm of the Government that is actually being applied and the purpose and effect of which is to deter the free exercise of rights protected by the First Amendment. There is no issue or question of a *mere threat* of enforcement or application of a policy which allegedly cannot survive First Amendment scrutiny. Accordingly, the *Mitchell* doctrine does not apply in this case —even assuming the doctrine itself has survived *Dombrowski.*

It should be borne in mind that one of the policies which supports the concept of justiciability is that courts will not unnecessarily interfere with the legitimate functioning of government. *Powell* v. *McCormack,* 395 U.S. 486 (1968). This policy is manifest in a rule that requires that substantive issues be sufficiently focused and narrowed before a court will endeavor to adjudicate them. *NSA* v. *Hershey,* 412 F.2d at 1114-15. And while a court will more readily tend to adjudicate where a chilling effect is alleged, *Reed Enterprises* v. *Corcoran,* 354 F.2d at 523, Chief Judge Bazelon has warned that:

> One result of adjudicating wherever there is a chill may well be to require resolution of complex questions without the beneficial focus afforded by adversary argument trained upon a concrete factual dispute. To permit adjudication of a legal question or dispute solely on account of its chill is in effect to concede that the substantive issues apart from the chill are themselves not ripe for adjudication. [*NSA* v. *Hershey,* 412 F.2d at 1114-15.]

That this caveat is particularly applicable where the challenged statute or policy has not yet been applied is evident. In such a case, there remains the potential danger that the substantive issues will appear unfocused. However, where, as here, the statute or policy under attack is actually being applied, the facts relating thereto can be readily ascertained and the issues defined so that plaintiffs no longer assert general grievances against governmental practices which courts have traditionally refused to adjudicate. See *Flast* v. *Cohen, supra.*

It is the crucial distinction between the *threat of application* of a policy and its *actual application* which the Government in its main brief fails to recognize. And it is precisely because the instant case does not involve a threat of application but the actual application of an overly broad policy, that there is no need to engage in line-drawing to ascertain where along the continuum, ranging between the most general and most direct threat poles, this claim falls in order to conclude that it is a justiciable case or controversy.[8] See *NSA* v. *Hershey,* 412 F.2d at 1111.

Failing to observe this crucial distinction, the Government contends that justiciability is to be determined by mechanically applying the test set forth in *Baker* v. *Carr,* 369 U.S. 186 (1962). There, the Supreme Court said that in determining whether a justiciable case or controversy exists the "inquiry necessarily proceeds to the point of deciding

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[8] For the same reason, the instant case is distinguishable from both *NSA* v. *Hershey, supra,* and the recent case of *Davis* v. *Ichord,* No. 23,427 (D.C. Cir., Aug. 20, 1970). In both cases this Circuit was faced with the question whether the *threat of enforcement or application* of a challenged policy gave rise to a justiciable case or controversy. For a more detailed discussion of these cases, see subsection B *infra.*

whether the *duty* asserted can be judicially identified and its *breach* judicially determined, and whether protection for the right asserted can be judicially molded." *Id.*, at 198 (emphasis added).

In attempting to apply this test, the Government suggests correctly that its duty is not to interfere with plaintiffs' free exercise of First Amendment rights. However, it incorrectly states the nature of the breach of that duty. The breach lies in the actual application of a policy overly broad in the area of First Amendment rights which has the effect of deterring the free exercise of those rights. The Government confuses the breach of its duty not to interfere with or violate plaintiffs' First Amendment rights with the nature of injury which it feels is requisite to establish a justiciable case or controversy. For example, the Government would ask this court to apply the following test: "Here, this court if it is to apply the chilling effect doctrine needs to find a well defined *threat* that a *specific and ascertainable result* will occur [*e.g.*, suffer criminal prosecution, loss of employment, payment of a tax, etc. (Br. 16-17)] if the contemplated act were to be done by the plaintiffs." (Br. 26) (emphasis supplied).[9]

In assuming this position, the Government misinterprets the role which the chilling effect doctrine plays in the de-

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[9] Of course the Government has failed to recognize the distinction between the requirements of standing and ripeness. The essence of standing is injury. *Flast* v. *Cohen, supra.* It is now well recognized that a chilling effect upon protected expressional and associational rights meets the requirement. *Dombrowski* v. *Pfister, supra.* The actual application of an overbroad policy regulating expression, *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), and in many cases, the mere threat of enforcement of such a policy, *NSA* v. *Hershey, supra,* is sufficient to meet the requirements of ripeness.

termination of whether a justiciable case or controversy exists. In First Amendment cases where the chilling effect doctrine has been applied it does not appear that an element requisite to its applicability has been "that a *specific and ascertainable result will occur* if the contemplated act were to be done by the plaintiffs." (Br. 26). (Emphasis supplied.) See *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), *aff'g sub nom., Heilberg* v. *Fixa,* 236 F. Supp. 405 (N.D. Cal. 1964). Instead, the judiciary, when confronted with the justiciability issue, has been concerned with whether the governmental activity is likely to deter or inhibit the free exercise of such fragile and vulnerable rights as those protected by the First Amendment. *See, e.g., United States* v. *Robel,* 389 U.S. 258, 265 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967); *Lamont* v. *Postmaster General, supra; Dombrowski* v. *Pfister, supra; NAACP* v. *Button,* 371 U.S. 415, 433 (1963); *Talley* v. *California,* 362 U.S. 60, 65 (1960); *NAACP* v. *Alabama,* 357 U.S. 449, 462 (1958); *Watkins* v. *United States,* 354 U.S. 178, 197-98 (1957); *American Communications Association* v. *Douds,* 339 U.S. 382, 402 (1949); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Davis* v. *Ichord, supra; NSA* v. *Hershey, supra; Wolff* v. *Selective Service Local Bd. No. 16, supra; Reed Enterprises* v. *Corcoran, supra; Straut* v. *Calissi, supra; Local 309* v. *Gates,* 75 F. Supp. 620, 624 (N.D. Ind. 1948). *See generally* Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication,* 22 Stan. L. Rev. 196 (1970); Note, *The Chilling Effect in Constitutional Law,* 69 Colum. L. Rev. 808 (1969).

Furthermore, the Government attempts to support its position—its doctrinal requirement that a "specific and ascertainable result" (Br. 26) or tangible injury must fol-

low as a consequence of plaintiffs having engaged in constitutionally protected activity—by showing that in the instant case there is no tangible sanction while in other cases there was either the imposition of criminal liability or the denial of the right to employment or to the pursuit of a profession (Br. 27). It is noteworthy, however, that at this juncture in its brief the Government fails to mention or discuss cases where the governmental activity creating the chill would not result in any tangible injury beyond imposing upon the plaintiff the choice of engaging in a simple affirmative act or forfeiting constitutionally protected rights, *Lamont* v. *Postmaster General, supra, aff'g sub nom., Heilberg* v. *Fixa, supra; Talley* v. *California, supra,* or where the mere presence of police and their surveillance activity were found to inhibit the exercise of rights protected by the First Amendment. *Local 309* v. *Gates, supra.*

The thrust of the lower court's opinion in *Lamont*'s companion case, *Heilberg* v. *Fixa, supra,* lends credence to plaintiffs' theory that a finding of justiciability should be triggered by the mere existence of the First Amendment chill or inhibition which flows, not from the *threat of application,* but from the *actual application* of an overly broad policy without any necessity of proof or allegation of some tangible sanction beyond that deterrent effect.

Heilberg involved an Act of Congress requiring the Postmaster General to detain unsealed foreign mailings of "communist political propaganda." 39 U.S.C. §4008 (1964). The Post Office mailed a notice to the addressee, who then had to request delivery of the mail on a reply card. If the addressee requested the Post Office to forward any similar publication in the future, his name was placed on a list of

persons who had requested the delivery of "communist political propaganda." [10]

On the issue of whether the operation of the statute unconstitutionally inhibited the free exercise of First Amendment rights, the court in *Heilberg* did not decide whether the delay in receiving the mail alone constituted a sufficient basis for the determination that the statute did not pass constitutional muster. And while the court did note that a "serious obstacle to the exercise of these rights arises out of the statute's requirement that the addressee of 'communist political propaganda' indicate a 'desire' to receive it," 236 F. Supp. at 408, it is clear that the more serious injury was manifest in the practice of the maintenance of a listing of persons desiring to receive such mail.[11] Such an encroachment upon First Amendment rights should be, without more, the basis for a finding of justiciability as well as for striking down the statute as unconstitutional on its face.

Apparently conceding the unconstitutionality of the listing, the Post Office had stopped maintaining the list by the time the case reached the Supreme Court. *Lamont* v. *Post-*

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[10] The Government argued that the suit was rendered moot by the action of the General Counsel of the Post Office Department in notifying plaintiff that although the latter had refused to return the card, the addressee nevertheless had instituted the suit and that this action would be construed as "an expression of a desire to receive all mail that was and in the future would be detained. . . ." 236 F. Supp. at 407. The district court ruled that the action was not thereby rendered moot because plaintiff's mail would continue to be detained in order that it be classified and, contrary to plaintiff's wishes, his name would remain on a list of persons desiring to receive such mail.

[11] The *Heilberg* court noted that "the statute . . . did not itself provide for such a list, but it is difficult to see how the program could have operated otherwise." 236 F. Supp. at 408-09.

master General, supra. The Supreme Court dismissed the Government's argument that there no longer was any abridgement of protected rights and held that "the Act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. . . ." 381 U.S. at 305. The Court made clear that the primary constitutional injury arose not from the damage to the addressee's rights, but from the fact that the reply card requirement "is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. . . . [A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" 381 U.S. at 307.

In the recent case of *Hentoff* v. *Ichord,* No. 3028—70 (D.D.C., Oct. 28, 1970) (Gesell, J.), the district court enjoined the Public Printer and Superintendent of Documents from printing and distributing a Report of the House Committee on Internal Security, observing that such public dissemination would clearly chill First Amendment rights. The court said:

> [I]t is important to emphasize that this litigation unquestionably presents an immediate issue of free speech and assembly. The Report is exclusively concerned with speakers on college campuses who appeared there by invitation or otherwise and discussed issues of current importance in our society. It is not suggested in the Report that the speeches in any instance presented any clear or immediate danger, but simply that the speakers are "Pied Pipers of pernicious propaganda."

They are listed in the so-called "blacklist" merely because they spoke and are believed to have been at some time associated with an organization distasteful to the Committee.

The Committee listed speakers in the report apparently with the hope and expectation that college officials, alumni and parents would bring social and economic pressures upon the institutions that had permitted these speeches in order to ostracize the speakers and stultify further campus discussion. . . .

. . . .

Thus, whether or not the Report was prepared pursuant to a proper legislative purpose, . . . *there can be no question as to its impact upon the right of free speech and assembly.* This is an area that our form of government, our Constitution and decisions of the Supreme Court emphasize is entitled to the closest scrutiny and the broadest possible protection. See, *e.g., Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Abrams* v. *United States,* 250 U.S. 616 (1919) (Holmes, J. and Brandeis, J., dissenting). Recent history is full of instances where disregard for these basic freedoms has done damage to individuals and corroded our institutions. See, *e.g., Barenblatt* v. *United States,* 360 U.S. 109, 147-59 (1959) (Black, J., dissenting) . . . *Plaintiffs clearly demonstrate that they are faced with irreparable injury if publication of the "blacklist" under the auspices of the Congress is allowed* . . . . [*Hentoff* v. *Ichord, supra,* at pp. 4-5 (emphasis supplied).]

Bolstered by the decisions in *Heilberg, Lamont* and *Hentoff,* where the deterrent effect stemmed not from the pos-

sibility of any resulting tangible sanction, but from the required affirmative act of mailing a card and/or the maintenance of lists of persons and the mere contemplated publication of a list, this court should consider only whether it is likely that the free exercise of First Amendment rights will be deterred and not the nature of the sanction which may or may not be imposed as the price for engaging in such conduct. In short, the inhibitory effect *is* the injury requisite to justiciability; the nature of the sanction is irrelevant in the instant case.

But since chill is probably neither empirically ascertainable nor quantifiable, the essence of the chilling effect doctrine is a legal rule that "any burden placed upon First Amendment rights which might reasonably be expected to interfere or to prevent their exercise . . . [constitutes] an impermissible infringement on those rights." *Anderson* v. *Sills,* 106 N.J. Super. 545, 554 (Ch. Div. 1969), *rev'd,* 56 N.J. 210 (1970). The necessity for such a rule is occasioned by the fact that First Amendment rights are "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski* v. *Pfister,* 380 U.S. at 486. Where governmental activity encroaches upon those rights, the injury to be remedied is not only personal but also societal; it must be gauged by the impact on those who will not complain to the courts because of the very nature of the injury. By expanding the definition of the constitutional injury, the Supreme Court has in fact expanded the scope of the right which the First Amendment protects—from a right not to be prosecuted or otherwise sanctioned for speech, to a public right to keep government from interfering with free trade in the marketplace of ideas. Askin, *supra,* at 202. *See DuBois Club* v. *Clark,* 389 U.S. 309, 314-15, -18 (1967) (Douglas, J., dissenting).

Because the right has been viewed as expanded in scope (from personal to societal), it would appear that that which would be likely to inhibit its exercise is more readily cognizable. Thus, in determining whether the First Amendment chilling effect creates a justiciable case or controversy where an operating policy is facially attacked for overbreadth, plaintiffs contend that this court may take judicial notice of the existence of the chill and need not engage in constitutional factfinding.[12]

That a court may take judicial notice of the existence of the chilling effect was recognized in *Dombrowski* v. *Pfister, supra.* There, plaintiffs' "allegations and offers of proof," 380 U.S. at 487, provided the basis for establishing the existence of chill and bolstered the Court's judicially noticed finding that First Amendment activity would be inhibited.

In *Keyishian* v. *Board of Regents, supra,* where consideration was given to the impact of New York State's Feinberg Law prohibiting members of certain "subversive" organizations from teaching in the state's schools, the Supreme Court observed that "the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest." 385 U.S. at 607. Specific proof of the law's impact was not required by the Court. *See* Askin, *supra,* at 203, n. 38.

Similarly, when discussing the deterrent effect which the maintenance of lists of persons desiring to receive "communist political propaganda" would have on protected First Amendment rights, the district court in *Heilberg,* stated:

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[12] The alternative of course would be to require a factual hearing on the issue of "chilling effect" on remand.

> Similar lists under earlier non-statutory screening programs were routinely turned over to the House Committee on Un-American Activities, 85th Congress, 2d session, p. 2794 (1958). Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with "communist political propaganda." There are no similar assurances that this information will not be made available in the future in view of the lack of a statutory requirement that information received . . . remain confidential. [236 F. Supp. at 409.]

And when comparing the inhibitory effect inherent in an ordinance requiring the names of distributors of certain handbills to be indicated thereon, struck down as an unconstitutional abridgment of First Amendment freedoms in *Talley* v. *California, supra,* to the addressee disclosure requirement, the district court in *Heilberg* had this to say:

> If identification of a distributor is constitutionally impermissible, a fortiori, identification of a recipient, whose rights are similarly protected . . . would no less '*tend to restrict* * * * freedom of expression.' [236 F. Supp. at 409 (emphasis added).]

See also Hentoff v. *Ichord, supra.*

Applying this analysis to the instant case, this court should take notice of the obvious "freezing effect," *NSA* v. *Hershey,* 412 F.2d at 1114, which this widespread surveillance system and practice of maintaining dossiers on individuals who engage in constitutionally protected political activity is having on First Amendment expressional

and associational conduct. As was noted in *Watkins* v. *United States,* 354 U.S. 178, 197-98 (1957), the real constitutional injury which stems from such unconstitutional governmental activity is "the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate." [12a]

The Government makes much of the contention in our main brief that there is a threat of unknown purpose and prospective use of the materials gathered pursuant to the unlawful civilian spy network (Br. 17, 26). Surely the Government's memory is very weak if it cannot remember the pall which McCarthyism cast over the country in the 1950's. Judge Gesell's language in his opinion in *Hentoff* v. *Ichord, supra,* is particularly appropriate here. In commenting upon the public dissemination of a House Committee on Internal Security Report whose contents included a list of persons who had been engaged in lawful expressional activity and the purpose of which was to "ostracize the speakers and stultify further campus discussion" (at p. 4), the judge stated:

> These are times of stress when our most cherished institutions are threatened by extremists of many different persuasions. It is in these circumstances that the right of free speech and assembly must be jealously safeguarded by all branches of government to the end that the interchange of ideas and discussion, not violence, shall fashion the future of this democracy. . . . [*Hentoff* v. *Ichord, supra,* at p. 12.]

[12a] Even if there were doubt as to the Court's authority to take notice that there is a chilling effect created by defendants' surveillance system, it would certainly be improper at this stage of the proceedings to notice there is not such a chilling effect.

Moreover, we would add that the judiciary must respond with swift and adequate remedies to the justiciable claims that protected rights and liberties are being eroded, for it must be clearly borne in mind that their suppression comes not in a flood-tide but in small and insidious steps.

Even if, as the Government contends, the threat of future use of the information now being gathered and stored by the military is unknown, certainly the surveillance system's widespread existence is known. (App. 10-19.) Unquestionably, such an intrusion by government in the form of the actual application of an overly broad policy which reaches both protected and unprotected activity cannot be tolerated where First Amendment freedoms are concerned. For as was noted by Justice Douglas in his dissenting opinion (and joined in by Justice Black) in *DuBois Clubs* v. *Clark,* 389 U.S. 309, 314, 318 (1967):

> Under our Constitution, one's belief or ideology is of no concern to government. One can think as he likes, embrace any philosophy he chooses, and select the politics that best fits his ideals or needs. That is all implicit in the First Amendment rights of assembly, petition, and expression. Those rights merely enforce, protect, or sanction the beliefs or ideology to which one is committed. So does the right of association which we have said over and over again to be part and parcel of those First Amendment rights. *Basic in this scheme of values is the immunity of beliefs, ideas, and ideology from government inquiry, probing, or surveillance.*
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> . . . .
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> [O]ne of . . . [the Constitution's] essential purposes was to take government off the backs of the people and keep it off. . . . (Emphasis supplied.)

B. *Plaintiff's Claim Satisfies the Test Laid Down by This Circuit on the Issue of Justiciability.*

Even assuming *arguendo* that the *Mitchell* doctrine does apply in this case, we think it clear that "there exists a controversy between the parties with such immediacy and presently adversary character as to require its adjudication." *Davis* v. *Ichord, supra,* at p. 8. Moreover, this Circuit's recent pronouncements on the question of justiciability in *NSA* v. *Hershey, supra,* and *Davis* v. *Ichord, supra,* unquestionably support appellants' position that the elements essential to a justiciable case or controversy are clearly presented.

In determining whether a chilling effect upon the exercise of rights protected by the First Amendment gives rise to a justiciable case or controversy, this Circuit said in *Davis* v. *Ichord, supra,* at p. 14, that the following considerations are pertinent:

> The source of the chill, the extent to which it focuses upon the conduct of those who allege it, and the likelihood that it will affect that conduct.

And in *NSA* v. *Hershey,* 412 F.2d at 1115, it was noted that:

> In determining whether a given chilling effect is sufficient, it would seem relevant to consider *inter alia*: (1) the severity and scope of the alleged chilling effect on First Amendment freedoms, (2) the likelihood of other opportunities to vindicate such First Amendment rights as may be infringed with reasonable promptness, and (3) the nature of the issues which a full adjudication on the merits must resolve, and the need for factual referents in order properly to define and narrow the issues. These considerations

> become relevant, of course, only if the plaintiffs plausibly allege that they are in fact vulnerable to the alleged chilling effect. . . .

In relating these considerations to the instant case, it would be appropriate to discuss initially the "source" of the chill.

As was noted in *Davis* v. *Ichord, supra,* at p. 14:

> The free exercise of First Amendment rights is perhaps more readily inhibited by a law justifiably suspect as vague or overbroad, because of the uncertainty of its application, than from the apprehension that a law, valid on its face, will be unconstitutionally administered. . . .

In the instant case the "source" of the chill is a policy which suffers from the constitutional infirmity of overbreadth. There is not involved here a question of whether a general threat of enforcement or application may or may not harden into a justiciable case or controversy. Instead, the source is the *actual application* of a surveillance system and maintenance of dossiers which reaches both constitutionally protected and presumably unprotected protest activity (App. 10-53).

Focusing on the threat of application-actual application distinction, it is clear that the *Davis* case differs from the instant case in several important respects.

First, although several of the appellants in *Davis* had been subpoenaed and actually appeared and testified before HUAC (Opinion, p. 5), the case as framed in the original complaint was rendered moot by reason of the expiration of the 90th Congress and the abolition of HUAC (Opinion, pp. 5-6); any involvement of appellants with HUAC had

thus ceased. Therefore, the possibility that the appellants would be subpoenaed to testify before the new committee (HISC) which replaced HUAC could only be characterized as a general threat. In contrast, this case, as has been said repeatedly, does not involve a *threat of application* of an overly broad policy. The Army's surveillance scheme and maintenance of dossiers is widespread in its existence and *actual application* (App. 10-53).

Second, that which was attacked in *Davis* involved an endeavor—the exercise by Congress of its power of investigation in aid of legislation—for which there is at least some arguable constitutional authority. This case, on the other hand, involves a facial attack upon a civilian monitoring program and maintenance of dossiers by the military arm of the Government, conduct which has no constitutional or statutory source of authority. See Point II of appellants' main brief.

Third, the *Davis* appellants' challenge to the existence and possible or threatened non-legislative use of the files was not a facial attack, but an attack as applied. That this is the case is bolstered by the court's own language. The court said:

> It is not claimed that any non-legislative use of the committee's files is authorized by the mandate, no matter how broadly construed by appellants; and appellants do not allege except as we have indicated that the files have been or will be used to their personal detriment. . . . [*Davis* v. *Ichord, supra*, at p. 16.]

Thus, appellants' attack for unconstitutional administration failed to meet the court's test:

> In the . . . case [where a statute or policy is attacked as applied], the chill, to be judicially cognizable, must be presented in a concrete factual setting specifying plausible threats of improper administration. . . . [*Davis* v. *Ichord, supra,* at p. 14.]

Since the instant case involves a facial attack on the existence of the maintenance of dossiers and data banks containing information about appellants' lawful and protected activity, and not an attack as applied, it differs fundamentally from the *Davis* case.[13]

When the Army's domestic intelligence scheme is viewed in this light, the "severity and scope" of the policy's chilling effect and the likelihood that that policy will inhibit appellants' conduct and the conduct of the members of the class become evident. Since the policy is actually being applied, the element of specificity must be found to exist. And wherever on the sliding scale which measures "severity" of chill one would endeavor to place the resulting deterrent effect which flowed from the affirmative action requirement in *Lamont* v. *Postmaster General, supra,* the list-maintenance scheme in *Heilberg* v. *Fixa, supra,* the Hershey directive deferment policy in *NSA* v. *Hershey, supra,* or the publication action in *Hentoff* v. *Ichord, supra,* it is unquestionable that the policy attacked in the instant case has the severe effect of inhibiting protected expression and association.

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[13] It is clear that the majority of the panel in *Davis* found the conclusionary allegations in appellants' complaint factually and legally insufficient to bring "the parties into controversy of such present aliveness and immediacy as to require the [court] to render a constitutional decision." *Davis* v. *Ichord, supra,* at p. 12. Put another way, the mere possibility of non-legislative use of the files detrimental to appellants did not create a sufficient chilling effect so as to give rise to a case or controversy.

Moreover, it is also clear that the applied policy attacked in this case "focuses" not only "upon the conduct of those who allege it," *Davis* v. *Ichord, supra,* at p. 14 and see App. 10-19, but also upon the entire class of persons engaged in lawful and protected conduct. For as this Circuit stated when analyzing this element of the test:

> In the . . . case [where a statute or policy is attacked for vagueness or overbreadth] "the danger of tolerating, in the area of First Amendment freedoms," a "statute [or policy] susceptible of sweeping and improper application," *NAACP* v. *Button, supra,* 371 U.S. at 433, is that one may feel obligated to guide his conduct by what is potentially proscribed. *Baggett* v. *Bullitt, supra,* 377 U.S. at 372; *Keyishian* v. *Board of Regents,* 385 U.S. at 601; *National Student Ass'n* v. *Hershey,* 134 U.S. App. D.C. 56, 64, 412 F.2d 1103, 1111 (1969). . . . [*Davis* v. *Ichord, supra,* at p. 14.]

The issues presented in this case are clear and narrowly defined. It presents a facial constitutional attack on a specific policy and also raises the question of the authority for that policy. No issue is presented concerning the manner in which the policy is applied. *Cf. NSA* v. *Hershey,* 412 F.2d at 1119. Accordingly, the need for factual referents, that is, that the chill "be presented in a concrete factual setting specifying plausible threats of improper administration," *Davis* v. *Ichord, supra,* at p. 14, is not manifest.[14]

It is also beyond dispute that plaintiffs are vulnerable to the chilling effect occasioned by the Army's program.

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[14] It should be noted that because the surveillance scheme is widespread in its application, any need for factual referents is satisfied. (App. 10-19.)

Just as "[c]ollege students . . . [were] in fact the segment of the population most obviously vulnerable to General Hershey's threat of reclassification," *NSA* v. *Hershey,* 412 F.2d at 1120, individuals and associations and their members who engage in lawful political protest activity are the most likely objects of the Army's spy network and data banks. On this issue, the *NSA* panel said:

> Any chilling effect on the protected interests of their [political associations] members is at the same time a damper on their organizational protest activities. We think they have standing to assert both their own First Amendment interests and those of their members. [412 F.2d at 1120-21.]

See NAACP v. *Button,* 371 U.S. at 428. *And see* pp. 40-41 of appellants' main brief.

Lastly, it is clear that there exists no other opportunity to vindicate the Army's unconstitutional abridgment of the extremely fragile and precious rights protected by the First Amendment. Unlike *Dombrowski, Wolff,* or *NSA* where there existed, however attenuated, some possibility for a court to consider the critical constitutional issues presented when raised in defense to criminal prosecution, there is not even the most remote prospect of judicial intervention to safeguard the rights which appellants contend have been and are continuing to be abridged. Since protected activities are involved, no criminal prosecution is likely to follow. Thus, "a delay in adjudication holds no promise of 'a better case.'" *NSA* v. *Hershey,* 412 F.2d at 1119.

In sum, unless this court holds that this claim is justiciable and that the surveillance scheme and maintenance of

dossiers by the Army are unconstitutional, the chilling effect may spread indefinitely and the cost will likely be the dilution and ultimate suppression of these cherished rights. And the "1984" forecasts of George Orwell will have proved quite prophetic.

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